NEW EDITION

OF THE

BABYLONIAN TALMUD

Original Text, Edited, Corrected, Formulated, and Translated into English

BY

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SECTION JURISPRUDENCE (DAMAGES)

TRACTS BABA KAMA (FIRST GATH)

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EXPLANATORY REMARKS.

In our translation we adopted these principles:

1. *Tenan* of the original—We have learned in a Mishna; *Tania*—We have learned in a Boraitha; *Itemar*—It was taught.

2. Questions are indicated by the interrogation point, and are immediately followed by the answers, without being so marked.

3. When in the original there occur two statements separated by the phrase, *Lishna achrena* or *Waïbayith Aema* or *Ikha d'amri* (literally, "otherwise interpreted"), we translate only the second.

4. As the pages of the original are indicated in our new Hebrew edition, it is not deemed necessary to mark them in the English edition, this being only a translation from the latter.

5. Words or passages enclosed in round parentheses ( ) denote the explanation rendered by Rashi to the foregoing sentence or word. Square parentheses [ ] contain commentaries by authorities of the last period of construction of the Gemara.

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INTRODUCTION TO THE THREE GATES OF SECTION JURISPRUDENCE.

THE three tracts *Baba Kama*, *Metzia*, and *Bathra* (the First, Second, and Third Gates) are unique in the whole Talmud in this respect, that they bear no name indicating the contents, as is the case with all other tracts of the Talmud, and we do not find in any commentary any explanation or discussion of the fact. It may be because the reason is very simple, namely, that these three tracts are the only ones which treat purely of civil law, for even in cases of larceny only the civil side (as the actual damage, and the fine for causing it) is treated of (if there is here and there mentioned some criminal liability, it is only incidentally as a citation in course of the discussion); and as the cases are very numerous and varying in character, no appropriate title could be found to indicate the contents of each tract. Indeed, so numerous are they that we may safely say there is no civil case which can possibly arise between man and man that is not treated of in these tracts. The other tracts of this section, which are enumerated in our introduction to Volume I. (IX.), treat each of a separate and distinct subject and not of purely civil law.

For those especially interested in comparative jurisprudence we give below two articles by prominent publicists, which illustrate only two of the many important principles scattered all over the Talmud.

The first, "The Talmud," by I. D'Israeli, is an extract from "Curiosities of Literature," and is as follows:

In the order of *damages* containing rules how to tax the damages done by man or beast or other casualties their distinctions are as nice as their cases are numerous. What beasts are innocent and what convict. By the one they mean creatures not naturally used to do mischief in any particular way, and by the other, those that naturally or by a vicious habit are mischievous that way. The tooth of a beast is convict, when it is proved to eat its usual food, the property of another man, and full restitution must be made ; but if a beast that is used to eat fruit and herbs, gnaws clothes or damages tools, which are not its usual food, the owner of the beast shall pay but half the

damage when committed on the property of the injured person ; but if the injury is committed on the property of the person who does the damage, he is free, because the beast gnawed what was not its usual food. And thus, if the beast of A gnaws or tears the clothes of B in B's house or grounds, A shall pay half the damages, but if B's clothes are injured in A's grounds by A's beast, A is free, for what had B to do to put his clothes in A's grounds ? They made such subtile distinctions, as when an ox gores a man or beast, the law inquired into the habits of the beast ; whether it was an ox that used to gore, or an ox that was not used to gore.

However acute these niceties sometimes were, they were often ridiculous. No beast could be *convicted* of being vicious till evidence was given that he had done mischief three successive days ; but if he leaves off those vicious tricks for three days more, he is innocent again. An ox may be convict of goring an ox and not a man, or of goring a man and not an ox ; nay, of goring on the Sabbath and not on a working day. Their aim was to make the punishment depend on the proofs of the design of the beast that did the injury, but this attempt evidently led them to distinctions much too subtile and obscure. Thus some rabbins say that the morning prayer of the *Shem'ah* must be read at the time they can distinguish *blue* from *white ;* but another, more indulgent, insists it may be when we can distinguish *blue* from *green !* which latter colors are so near akin as to require a stronger light. With the same remarkable acuteness in distinguishing things is their law respecting not touching fire on the Sabbath. Among those which are specified in this constitution, the rabbins allow the minister to look over young children by lamp-light but he shall not read himself. The minister is forbidden to *read* by lamp-light, lest he should trim his lamp ; but he may direct the children where they should read, because that is quickly done, and there would be no danger of trimming his lamp in their presence, or suffering any of them to do it in his. All these regulations, which some may conceive as minute and frivolous, show a great intimacy with the human heart, and a spirit of profound observation which had been capable of achieving great purposes.

The owner of an innocent beast only pays half the costs for the mischief incurred. Man is always convict and for all mischief he does he must pay full costs. However, there are casual damages—as when a man pours water accidentally on another man ; or makes a thorn-hedge which annoys his neighbour ; or falling down, and another by stumbling on him incur harm : how such compensations are to be made. He that has a vessel of another's in his keeping, and removes it, but in the removal breaks it, must swear to his own integrity ; i.e., that he had no design to break it. All offensive or noisy trades were to be carried on at a certain distance from a town. Where there is an estate, the sons inherit, and the daughters are maintained, but if there is not enough for all, the daughters are maintained and the sons must get their living as they can, or even beg. The contrary to this excellent ordination has been observed in Europe.

The second, of which a literal translation follows, was written in Hebrew by Dr. D. H. Farbstein, a counsellor-at-law in Zurich,

Switzerland, in the "Hashana" (Year-book) for 1900, under the title "One Cannot Grant that Which is not in Existence."

There is no law which has not its reason. Every legal principle is the result of a certain economic and political condition ; it is the product of a certain epoch, aiming to benefit the political and economic life of that historic epoch.

The legal principle that one cannot grant that which is not yet in existence had its origin in the Hebrew nation and was the product of a certain epoch, and we shall endeavor here to explain the motives which prompted the development of this legal precept.

This principle existed also in the laws of other Semitic nations in general, and in the Mahometan laws in particular. It was, however, unknown to the Roman law, as according to the Roman law one could grant that which was not yet in existence, and the sale of an article which existed only in expectation was valid, and even the mere expectation could form the subject-matter of a purchase or sale.

The reason of this difference between the Semitic laws in general, and the Jewish laws in particular, and the Roman laws on this point lies, in my judgment, in the prohibition of taking usury.

"Thy money shalt thou not give him upon usury, nor lend him thy victuals for increase" [Lev. xxv. 37] is one of the principal Mosaic laws. And as it is prohibited to give money upon usury, so also is it prohibited to raise the price ; as, for instance, if the price of an article is such and such in cash, it is prohibited to raise the price of such article if sold on credit for a certain time, for it is nothing but indirect usury.

This law was necessary as long as it was prohibited to give money upon usury ; in our own times, however, when industry and commerce have developed so much, it is very usual to buy and sell things which exist only in expectation. In the time of the Talmudists the one who sold that which was not in existence was not an ordinary merchant, but only one who needed money. For instance, a farmer needed money. He applied to the money-lender for a loan. The money-lender was willing to make the loan, but was kept back by the prohibition to give money on usury. In order to evade this prohibition he bought of the farmer the future products of his farm, paying him only a very low price. The difference between the actual value of the products and the price paid by the lender is nothing but indirect usury.

Similar methods are practised even now in those countries where usury is prohibited by the law of the land. The Talmudists, in order to prevent such and similar evasions of the prohibition to take usury, have established the principle that no one can grant that which is not yet in existence ; for the same reason, they also prohibited the fixing of a price upon future products before the market price is established. They were, at the same time, careful in stating that one cannot *grant*, and not that one cannot *buy*, affording thereby protection to the grantor only that he may rescind the sale if he elects to do so.

We see, then, that the rule that "one cannot grant," etc., was established with the end in view of preventing any evasion of the prohibition to take usury.

In those days commerce was not so developed as it is in our days, nor was money of such established currency as it is now. Nowadays one invests money in merchandise and then sells the merchandise and realizes his money with a profit, which was not so in those days; and for that reason the taking of usury was prohibited, for money could bring no economic benefit to its owner.

But although it was prohibited to grant that which was not yet in existence, still it was allowed to grant that which would bring benefit in the future—as, for instance, to lease land for cultivation—for the substance producing the benefit is in existence.

This distinction between interest (compensation for the use of money) and rent (compensation for the use of an article producing benefit) was drawn also by the Catholic theologians of the middle ages, who also prohibited the taking of usury, but permitted the receipt of rent.

We, however, cannot fully agree with Dr. Farbstein, for the following reasons:

(*a*) The principal things concerning which this rule was made were marriage and inheritance. If one marries a woman upon the condition that she should become a proselyte, the marriage is null and void, because it is on condition of something which was not yet in existence. The same is the case as regards inheritance—one cannot say to a woman: "I will leave my estate to the children you may bear." In both these cases, usury cannot be the reason.

(*b*) The rule that a man cannot grant that which is not yet in existence is not an established one by all the sages, for there were many of the most popular—as R. Eliezer b. Jacob, R. Meir, and R. Juhudah the Prince—who held that one might grant that which is not yet in existence (see Kiddushin, 62 *b*, at the end), and certainly all of those sages were aware of the prohibition of usury.

It seems to us, therefore, that the sages who hold that such a thing cannot be sold is because they considered speculative transactions as robbery, so that they prohibited all kinds of gaming existing at that time; and the one who participated in such games was disqualified as a witness, because he was considered a robber. We find, however, in this volume, p. 198, that a woman may sell the benefit of her marriage contract, although it looks like speculation; for she may die during the life-time of her husband, and her husband will inherit from her. But even this is discussed, and seems to be an enactment of some sages for the benefit of the woman. (See text.)

SYNOPSIS OF SUBJECTS

OF

TRACT BABA KAMA (THE FIRST GATE).*

CHAPTER I.

MISHNA *I.* There are four principal cases of tort, etc. One thing is common to all. They are all likely to do damage and must be guarded against. The case of doing damage by digging up gravel. The different explanations of the word "mabeh" by Rabh and Samuel (foot-note). There are thirteen principal tort-feasors. The depository,† etc. There are twenty-four principal tort-feasors. What are the derivatives of all those principals? Why are the four principals, ox, excavation, mabeh, and fire, enumerated separately in the Scripture? From what and what kind of property must damage be collected? When the standard is taken, is it taken of one's own lands or of those of the public in general? In order not to close the door to borrowers, the sages have enacted that creditors should be paid out of the medium estates. If one conveys his estates to one or several persons, from whom and from what estates shall the creditors collect the money due them? In case one does a meritorious thing he shall do it up to one-third, ... 1–16

MISHNAS *II.* TO *V.* In all that I am charged with taking care of I have prepared the damage. There is a more rigorous rule in case of the ox than in the cases of the pit and the fire, and *vice versa.* How so? If one left his ox in charge of five persons, and one of them left intentionally and the ox caused damage, what is the law? No appraisement is made for a thief or robber. If one hypothecates his slave or his ox and thereafter sells him. There is a difference between movable and immovable real estate. Slaves are considered movable real estate. During the killing, the bringing of the suit, and the making of the award there shall be one and the same owner. There are five cases which are considered non-vicious and

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* See introduction to Synopsis in Tract Aboth, Vol. I. (IX.), p. xi.

† Farther on we use the term "gratuitous bailee," as being more comprehensive.

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CHAPTER VIII.

TRACT BABA KAMA (THE FIRST GATE).

CHAPTER I.

THE FOUR PRINCIPAL TORT-FEASORS; THE DIFFERENT MODES OF RESTITUTION; THE VICIOUS AND NON-VICIOUS ANIMALS; THE APPRAISEMENT BEFORE THE COURT.

MISHNA *I.*: There are four principal causes of tort (expressly mentioned in the Scripture): the ox; the (uncovered) excavation; the mabeh (the pasture of one's cattle in another's field); and the fire. The measure of the damages done by the ox is different from that of the damages done by the mabeh, and *vice versa;* and that of both, which are animated beings, is not like that of the damages caused by the fire, which is not animated. And the measure of damages caused by the three last mentioned, which are movable, is different from that of the damages caused by the (uncovered) excavation, which is stationary. One thing, however, is common to all, and that is, that they are all likely to do damage, which must be guarded against, and if damage is done, the one responsible for it must make good from his best estates.

GEMARA: If the Mishna states that there are "principals" there must be derivatives. Are those derivatives as their principals or not? Said R. Papa: "Some of them are and some of them are not" (as explained further on). The rabbis taught: "It was said of the ox that he has three principals, the horn, the tooth, and the foot. Of the horn the rabbis taught: It is written [Ex. xxi. 28]: "If an ox *gore,*" and goring is only with the horn, as it is written [Deut. xxxiii. 17]: "And his horns are like the horns of reem; with them shall he push (gore)," etc. What is the derivative of the horn? Hurting, biting,

lying upon,* and kicking; (because they are usually done intentionally, as goring). Why is "goring" called a principal? Because it is written [Ex. xxi. 28]: "If an ox gore?" Let also hurting be a principal, because it is written [ibid., ibid. 35]: "And if a man's ox *hurt.*" That hurting means goring, as we have learned in the following Boraitha: "It starts out with hurting, and it ends with goring, to teach thee that the hurting mentioned here means goring." Why does the Scripture in case of a man use the term "gore," while in the case of an animal it uses the term "hurt"? For a man, who is fortunate,† (who is guarded by his planet) "gore" is used (because it is certain that the ox gored him intentionally with all his might to harm him), but of an animal, which is not fortunate, "hurt" is used, and by the way it teaches us that an ox which is vicious toward a human being is considered vicious toward an animal, which case is not so in the reverse. But is then "biting" not the derivative of the "tooth"? Nay, the tooth usually derives benefit by doing the damage (consuming), which is not the case with biting. Are not lying upon and kicking the derivatives of the foot (because it cannot be done without bending of the feet)? Nay, damage by the foot is of frequent occurrence (because whenever the animal walks and there is something in the way it damages it), which is not the case with the above. But to what does R. Papa refer in stating that the derivatives are not like their principals? Shall we assume that he refers to those just stated? This cannot be, for they are all of the same nature, as stated above, and the owner must guard against it, and he must pay the damage. We must therefore say that there is no difference between the principal and derivatives of the horn, and R. Papa's statement refers to the derivative of the foot, in case of doing damage by digging up gravel with the foot, in which case only one-half of the amount of the damage must be paid, and which is Sinaic (*i.e.*, the restitution is for actual damage and not as a fine, which is always the case whenever one-half damage is paid). But why is this case called a derivative of the foot? (only one-half of the damage is paid, while in the case of the principal the whole must be paid). It is a derivative in respect that (by the same tradition that if the damage-doing animal

* Spoiling vessels thereby.

† According to the other explanation of Rashi it is because a human being is provident, *i.e.* careful, and it is not easy to kill him unless by penetrating his body with the horns with great force.

is not of sufficient value to pay the amount of the damage) the balance must be paid from the best of one's estates, which is only so in case of damage by the foot. Is the latter part of this then certain ? Did not Rabha further on (page 33) propound a question wherefrom the damages shall be collected ? (This does not matter.) Rabha was not certain about it, but R. Papa was. Why, then, is it called a derivative of the foot, even according to Rabha's theory, who was not certain about it ? To equal it to the foot in that respect, that it is not liable if the damage was done on public ground (as damages done by the foot are not paid unless done on the ground belonging to the party damaged).

"*And mabeh,*" etc., "*and fire,*" etc. What is meant by "mabeh*" ? Said Rabh: "It means a man"; Samuel, however, said it means the tooth (of the ox). Why does Rabh not explain it as Samuel ? Because when the Mishna states "ox," it means everything with which an ox can do damage (consequently "mabeh" must be something else). And what is the reason of Samuel ? Is Rabh's opinion, then, not correct ? The Mishna states ox. Said Rabh: "It states 'ox' for the damage done by the foot, and 'mabeh' for that done by the tooth, and it must be explained as follows: The law of damages done by the foot, which is of frequent occurrence, cannot be applied to that of the tooth, which is not of frequent occurrence; on the other hand, the law of damage done by the tooth, which usually benefits thereby, cannot be applied to that of the foot, which derives no benefit."

But what is the matter with the horn ? Why is it left out ? This is included in the statement, "And if they do damage, the one responsible," etc. Why is it not mentioned expressly ?

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* Modern scholars come to the conclusion that originally the Mishna read המבעיר, which means one who started a fire, instead of המבעה, which latter word cannot be found either in the Scripture or in the Mishna elsewhere, and that this latter word originates from an error on the part of the transcriber in writing an ה instead of יר. And it seems to us that this view of the scholars is correct, for we find in one Tosephtha plainly the word "Hamabir" instead of "Hamabeh." We may add to this that Rabh's explanation, "It means a man," shows also that "Hamabir" is the correct word. We have therefore omitted all the citations of the passages to explain the meaning of the word "Hamabeh," as they are too far-fetched and were probably added by the expounders of Rabh's statement. Abraham Krochmal, however, maintains that in the first Mishnayoth it was used "Hamabir," but Rabbi, the editor of his Mishnayoth, wrote "Hamabeh," for the reason that this word has two meanings which can be applied to foot and tooth. (See his Notes on the Talmud, Lemberg, 1881, page 260.)

The Mishna states only cases of those which are considered vicious from the very beginning (and must pay the full amount of damage, as tooth and foot, etc.), but not cases of those which are not considered vicious from the beginning (as the horn, which pays the full amount of damages only on the third time of doing damage). Why does Samuel not concur with Rabh? He maintains that it cannot mean a "man," because this latter is enumerated in a subsequent Mishna: "A vicious ox, and an ox doing damage on the estate of the party suffering the damage, and the *man*." Why is "man" not mentioned in the first part of the Mishna? Our Mishna treats only of injuries done by one's property, but not of injuries done by one's person. Now as to Rabh, is then the "man" not enumerated in the subsequent Mishna? (Why, then, state it also in our Mishna?) Rabh may say: "It is mentioned in the later Mishna only because other vicious ones are mentioned therein, and according to him (who says that 'mabeh' means a man) the statement in the Mishna, 'the law of damages,' etc., must be explained thus: "The law of damages of an ox differs from that of a man in that the former pays 'atoning money,' while the latter does not (if a vicious ox kill a man by goring he pays atoning money, therefore if only the law of the ox would be stated, that of the man could not be deduced therefrom, because if a man kill another man unintentionally he is banished; if intentionally he suffers the death penalty, and pays no atoning money); and the law of a man differs from that of an ox in that the former is liable (in case of personal injuries caused to another man, in addition to the payment of actual damages) to four things (explained further on), which is not the case with the ox; the one thing common to both is that they are likely to do damage, and one is charged with taking care of them." [Is it then usual for an ox to do harm? It means a vicious one. But is it then usual for a man to do harm? Yea, when asleep. How is it to be understood? It is usual for a man when asleep to contract and stretch out his limbs, and all that is then in his way he damages.] But is not the man charged with his own care of himself? This can be explained as R. Abbuhu said elsewhere to one Tana: "Read, 'The man is charged with his own care of himself'"; so also is it to be read in our Mishna (and the statement in the Mishna that one is charged with taking care of them refers to the others mentioned).

R. Oshiyah taught: There are thirteen principal tort-fea-

sors: the depositary; the one loaning for use; the bailee for hire; the bailor for hire; the actual damage sustained through the personal injury; the expense incurred in curing the injury; the earnings lost through such injury and the shame suffered (this will be explained in Chapter VIII.), and those four principals mentioned in our Mishna, which make thirteen. (The depositary is liable for arbitrary damage; the one loaning for use is liable even for an accident; and the bailee for hire and the bailor for hire are responsible even for theft and loss, and, manifestly, for arbitrary damage; actual damage means that if one inflicts an injury on another person he must pay the difference in value of the person injured; the pain suffered, *i.e.*, so much as one whose arm, for instance, was to be amputated by an instrument would pay to be relieved by a drug from such pain as amputation would cause; all the others are explained further on in this volume.) Why did the Tana of our Mishna not state those nine? It is correct according to Samuel, because the Mishna treats only of injuries done by one's property, and not of injuries by one's person, but according to Rabh (who says that "mabeh" means a man, and so injuries by one's person *are* treated of) why does he not state them? The Mishna treating of "a man" means to include all damages done by a man. And according to R. Oshiyah, are they not included in the "man" stated in the Mishna? There are two kinds of damages done by man, viz., those done by him to another *man* (which constitute a crime), and those done by him to an ox (in which case the liability is restricted to civil damages only). If so, why not state the same thing in regard to an ox? Let him state a case where an ox injured a man, and a case where he injured another ox. What question is this? As to a man there is a difference between the injury done to a man and that done to an ox, for in the former he is liable for the four things, and in the latter case he pays only actual damages (and therefore both are stated); but in the case of an ox, what difference is there between the injury done by him to a man and that done by him to an ox? In both cases he pays only actual damages.

R. Hyya taught: "There are twenty-four principal tortfeasors, viz., those who pay double [see Ex. xxii. 4]; those who pay four or five [ibid. xxi. 37]; the thief (who confesses his guilt, in which case he pays only the actual value) and the robber (who is also a principal because he is mentioned in the Scripture [Lev. v. 23]; the collusive witness; the one who commits rape (is a

principal because mentioned in Deut. xxii. 29); the seducer [mentioned in Ex. xxii. 16]; the slanderer [Deut. xxii. 19]; the one who defiles heave-offering; the mingler (one who mingles together heave-offering with ordinary food); the one who brings a drink-offering (to the idols); (the three latter are not mentioned in the Scripture, but still they are principals for they pay pecuniary damage, and the latter is stated in the Scripture); and these with those thirteen mentioned above make twenty-four.

But why does R. Oshiyah not enumerate these mentioned here? He enumerates only those who pay actual damages, but not those who pay in form of a fine. If so, why does he not enumerate the thief and the robber who pay actual damages (as explained above)? He does so, for he states the depositary and the one loaning for use (in the case of the depositary it very often occurs that he sets up as a defence that it was stolen from him, and we have learned elsewhere that if one sets up a defence of theft or robbery he is responsible as a thief and robber). And as to R. Hyya, does it not state the depositary and the one loaning for use? He states separately property which came *lawfully* into his possession (as in the case of the depositary, etc.), and property which came *unlawfully* into his possession (as the thief).

It is correct according to the Tana of our Mishna, who states "principals" because there are also derivatives (which were enumerated above), but according to R. Hyya and R. Oshiyah if they state "principals" there must be derivatives; what are they? Said R. Abbuhu: They are all *as* principals in that respect that the damage must be paid from the best estates. What is the reason? It is deduced by an analogy of expression; in all those cases either the word "for" or "give" or "pay" or "money" is written. (Where it is written "for" we deduce it by analogy from the "for" stated as to the vicious ox, as there it is from the best estates (which in turn is deduced from the tooth and foot); so also it is here, if "give" or "pay" is written we deduce it from the ox that gored a slave where these words are written; if "money" is written we deduce it from the pit where the same word is written; and in all those cases it is paid from the best estates.)

"*The law of the damage done by an ox is not like that,*" etc. For what purpose does he mention this here at all? Said R. Zbid in the name of Rabha: "He means to say with that, that no question should be raised why the Scripture does not state

one of the tort-feasors and leave the others to be deduced (by way of analogy) therefrom, for one cannot be deduced from the other (as it is stated above; Rabh according to his theory and Samuel according to his).

"*And that of both which are animated,*" etc. For what purpose does the Tana mention this? Said R. Mesharshia in the name of Rabha: "He means to say that it should not be questioned why the Scripture does not state two of the tort-feasors (the ox and the mabeh), and fire would be deduced from these two; for this one cannot be deduced from those two (for the one is not like the others, etc., as stated in the Mishna). Said Rabha: "If any one of these should be mentioned with the 'pit,' all others could be deduced from those two by reason of having something common to all (as *e.g.*, if he would state the pit and the horn, the tooth could be deduced thus: the pit, the nature of which is not to move and do damage, must pay; the more so the tooth, the nature of which *is* to do so; and if you should say the pit is made from the very beginning to do damage, which is not so with the tooth, I will cite you the horn (which is not made so); and if you will say that the horn does the damage intentionally, I will cite you the pit and the conclusion will return (the former argument will be reinstated); the one thing common to all is that it is their nature to do damage, and one is charged with taking care of them, etc. I will also bring in the tooth. In such a way I would also deduce the foot, if the pit and the horn should be stated; and if it should be objected that the pit is from the beginning made to do damage, which is not so with the foot, the horn would be cited; and if it should be objected to on the ground that the horn does damage intentionally, the pit would be cited. And so forth as to all, with the exception of the horn, for the objection might be raised that they are all considered vicious from the beginning (which is not so with the horn). For what purpose, then, did the Scripture enumerate all of them? To teach their different peculiarities; viz., the horn—to distinguish between a vicious and a non-vicious one; the tooth and foot—to exempt them from liability if the damage was done on public ground (for it is written, Ex. xxii. 4, "and they feed in *another* man's field," but not on *public* ground); the pit—to exempt it from liability if vessels fell into it (and were damaged); the man—to make him liable to pay for the four things (which is not so in the case of the others); fire—to exempt it from liability if it consumed concealed articles (as

e.g., if articles were concealed in a stack of grain, in which case the liability is only for the grain, but not for the articles).

"*The one thing common to them all*," etc. What does this mean to include? (As from the statement it seems to include all other things the nature of which is to do damage, and one is charged with taking care of them, what other such things can there be?) Said Rabhina: "It means to include that which we have learned in the following Mishna: 'If notice be given to one to remove (within a certain time usually given by a Beth Din) a wall, or to cut a certain tree, (and he failing so to do within such time) they fall, he is liable.'" How is the case? If he renounced his ownership of them, then according to both Rabh and Samuel it is like the case of the pit; as a pit because it does often damage one must take care of it, so also is the case here.* If he has not renounced ownership, then, according to Samuel who says that they are all deduced from the pit, are they the same as the pit? Nay, the case is that he *has* renounced ownership, but lest one say that they are not like the pit which is originally made to do damage, which is not the case with the above things (the building of a wall or the planting of a tree), then the case of the ox proves that; and lest one say that the ox is different because of its usual way of doing damage with its feet, then again the case of the pit may prove and so the conclusion will return (and the original argument is reinstated).

"*To pay the damages.*" The rabbis taught: It is written [Ex. xxii. 4]: "With the best of his own field, and with the best of his own vineyard shall he make restitution." That means the best field and the best vineyard of the plaintiff (*e.g.*, if A's ox grazed upon a parcel of land belonging to B, the best land of B is taken as a standard, and A must pay an amount of damages equal to the difference in value of such a parcel of land before and after having been grazed upon). Such is the dictum of R. Ishmael; R. Aqiba, however, said: "The passage intends to state only that damages are collected from the best estates of the defendant (*i.e.*, the parcel of land of the plaintiff is appraised, and if the defendant wishes to pay in land he must do so with land of his own best estates), and so much the more in case of damages to consecrated articles. Is it possible that ac-

* This is no contradiction of what was stated above, that a pit does not do damage often, for it means that it does not do so as often as the foot, which treads on everything in its way.

cording to R. Ishmael restitution must be made with the best land even if land of an inferior quality be damaged? Said R. A'ha bar Jacob: "The case treated of here is that the best land of the plaintiff was of the same quality as the worst land of the defendant, and they differ on this point. R. Ishmael holds that the land of the plaintiff is taken as a standard, and the passage stating that he shall pay from the best estates, means from the best estates of the plaintiff, and R. Aqiba holds that that of the defendant is taken as a standard for best."

What is the reason of R. Ishmael's statement? The word "field" is written below (with the best of his own *field*) and also above (and they feed in another man's *field*) (ibid., ibid.); as above it has reference to the land of the plaintiff, so also in the statement below (and the passage is to be expounded thus: When the defendant has land which equals the best of the plaintiff's, he must pay out of such land the amount of the damage). And R. Aqiba? He may say, it is written: "With the best of his own fields, etc., he shall make restitution." That means not that of the plaintiff (and no deduction by analogy is admissible when the statement is so plain). R. Ishmael, however, may say: In this case we must derive the benefit of both the analogy of expression and the passages; the analogy of expression as I have explained, and the benefit from the passage I derive for explaining that it refers to a case where the defendant has both best and worst land, and the plaintiff has only best land, and the worst land of the defendant is inferior to the best of the plaintiff, in which case he cannot say to the plaintiff, collect your damages from my worst (because the passage gives the benefit to the plaintiff to be paid from the best), and therefore he must make restitution from his own *best* estates.

Abayi propounded the contradiction of the following passages to Rabha: It is written [ibid., ibid.]: "With the *best* of his own fields," etc., which means from the best estates only and with nothing else, and we have learned in another Boraitha: "It is written [Ex. xxi. 34]: 'And to return money (make restitution)'; means this to include *equivalents of money, even bran?*" (Rabha answered): This presents no difficulty. When he returns of his own will he may give even bran, but if through the court he pays from the best estates. Said Ula, the son of R. Ilai: "The wording of the passage seems to lead to the same

conclusion, for it is written 'shall he make restitution,' which signifies *involuntarily*." Said Abayi to him: "Is it then written 'restitution shall be made'?" (which would mean involuntarily). It is written "*he shall* make," etc., which can also mean voluntarily. When R. Papa and R. Huna, the son of R. Jehoshua, returned from the college they explained the above passage as follows: "Anything (of personal property) is considered as the best of estates, for if he cannot sell it (at a reasonable price) at one place, he can take it to another place (and therefore if he makes restitution with personal property he may do so even with bran); except (if he makes restitution with) land, he must do so only with the best estates in order to enable him to procure a buyer."

R. Samuel bar Abba of Akkrunia propounded the following question to R. Abba: When the standard (as to which are the best and which are the worst lands) is taken, is it taken of those lands of his own, or of those of the public in general? (*i.e.*, has the defendant to make restitution out of his *own* best estates, and if his worst lands are as good as the best of the public in general, must he nevertheless pay out of his *own* best, or if his worst lands are as good as those of the public in general, may he make restitution out of his worst lands?—for they are as good as those of the public in general). According to R. Ishmael this is no question, for he says that those of the defendant are taken as a standard (and therefore if his worst are as good as those of the plaintiff he pays out of his worst estates), but the question is only according to R. Aqiba, who holds that those of the defendant are to be taken as a standard. How is it? Shall we assume that the passage "the best of his own fields" means to exclude the lands of the plaintiff, or it means to exclude the lands of the public in general? And he answered him: The Scripture states expressly "of his *own* land," and you ask whether the land of the public in general is taken as a standard? R. Samuel objected: We have learned (in case there are to be collected a woman's claim under her marriage contract [Kethubah], damages, and other debts): If one has only good lands, all the claims are collected from the good lands; if he has only medium lands, all are collected from those lands; if only poor-quality lands, all are collected from those lands; if he has all the three, damages are collected from the good; ordinary creditors collect from the medium; the Kethubah is collected from the poor-quality lands; if he has good and medium land only,

damages are collected from the good; ordinary debts and the claim of his wife are collected from the medium lands; if he has medium and poor-quality lands only, damages and ordinary debts from the medium and the wife's claim from the poor-quality lands; if he has only good and poor land, damages from the good and the other two from the poor-quality land. Now, we see that the middle part of this Boraitha states "that if he had medium and poor land, damages and ordinary debts are collected from the medium and the other two from the poor land," and if it is as you say, that his own lands are taken as a standard, let the medium he has be considered the best (as they are *his* best), and the creditors shall be referred to the poor lands? Therefore said Rabhina: They differ as to the statement of Ula. For Ula said: "According to the Scripture the creditors are paid out of the poorest, for it is written [Deut. xxiv. 11]: 'In the street shalt thou stand, and the man to whom thou dost lend shall bring out unto thee the pledge into the street.' Now if it depends on the will of the debtor, he usually brings out the poorest article he possesses as a pledge; but why have the sages enacted that creditors shall be paid out of the medium? In order not to close the door to the borrowers." The one master holds of Ula's enactment, the other one does not (but adheres strictly to the meaning of the passage).

The rabbis taught: "(One who had to pay damages, ordinary debts, and the wife's claim), if he convey all his estates (the good, medium, and poor) to one person, or to three different persons at the same time, they pass to the grantees subject to the same liabilities as if in the hands of the grantors (*i.e.*, the one who bought the good pays off the damages, the one who bought the medium pays off the creditors, etc.). If at different times, all are paid from the estate sold last (for the buyers of the prior estates may each say: When I bought my land there were other lands from which to pay). If this estate is not sufficient, the last but one is resorted to; if still insufficient, the last but two is resorted to." How is the case, if he conveyed to one person? Shall we assume that he conveyed them by one deed, then surely they pass subject to the original liability, for even if he sold them to three persons, in which case one must have priority, you say that they pass subject to such liabilities, still more so if he sold to one? (what was the necessity of stating it?) Therefore we must say that it means that they were conveyed one after another (on three different days), and

why does he state three? To teach that although each one of them may say: "I left room enough for payment," the same thing may be said even if sold to one. He will say on each parcel of land: When I bought this parcel of land there were other parcels out of which to pay. The case here is that the good lands were the last to be sold (in which case it is more advantageous for him to let them collect according to their rights than to advance the argument that he left room for payment). So also said R. Shesheth. If so, shall they all collect of the good lands? (for at the time the first two estates were sold all the liability shifted over to the best lands). The grantee may tell them: "If you will be quiet and collect according to your original rights well and good, but if not I will return the deed for the sale of the poor land to the grantor (and then the liability will shift over to those lands, for no claims are collected from conveyed lands when there are free lands), and all of you will have to collect your claims from the poor land."

It is certain that when the grantee conveyed the medium and the poor lands, and left the best for himself, that they all collected their claims from the best lands, for those were the only ones which remained, and the others were no more in his possession so that he could refer to them saying, "I do not care for the enactment of the sages (for my benefit)"; but in case he conveyed the good land and left for himself the medium and the poor, how is it? (shall the claims be collected from the second grantee because he took his lands subject to the liability? and from the first grantee they cannot collect, for he can say he accepts the enactment of the sages, and the good estates which were at the time of the first conveyance free were subject to the liability for payment of the claims ?). Abayi intended to decide that all collect from the best estates. Said Rabha to him: "Did not the first grantee convey to the second grantee all his rights and interests he may have in them ? And now, if they would come to the first grantee, they could collect from the medium lands only, and although at the time the medium and poor lands were conveyed the good ones were still free, he could say, "I do not want to avail myself of the enactment of the sages"; so also the second grantee can tell them: "Collect your claims from the medium and poor lands," for when the second grantee bought the estates he did so with the intention to acquire all the rights and interest the first grantee had at the time. R. Huna, however, said: (The above passages, one mentioning "money" and the other "the

best estates," do not contradict each other), it means either money or best estates.*

R. Assi, however, said: "Money is as good as land." For what purpose is this statement? If for the purpose that it is considered the "best" (*i.e.*, although he has good land he may pay in money), then it is the same that R. Huna stated, and it would be sufficient to say "and so also said R. Assi." Shall we assume that it is for the purpose of teaching as in the case of two brothers who have divided up land between themselves, and subsequently a creditor (of their father) comes and levies upon the share of one of them (that the other may pay his share of contribution either in land or in money)? Did not R. Assi already state this case? For it was taught: "Two brothers partitioned their estates and subsequently a creditor came and levied upon the share of one of them; Rabh said the partition is thereby annulled (and a new partition must take place of the lands which remained), because he holds that brothers in such a case are as heirs. Samuel, however, said that it is valid, because he holds it is as an ordinary sale and as one who buys without a responsibility. R. Assi says he (the other brother) must pay his share of one-fourth in land and one-fourth in money, for he was in doubt whether they are considered as heirs, and he must contribute his share in land and not in money, or as an ordinary sale with responsibility, and he must pay to him what he lost, but in money, and therefore he must pay one-fourth in money and one-fourth in land), therefore he must pay one-fourth in land and one-fourth in money. But what is meant by the statement "it is as good as land"? that it is considered "best"? then it is again the same statement made by R. Huna? Say: "And so also said R. Assi."

R. Zera in the name of R. Huna said: In case one does a meritorious thing he shall do it up to one-third. What does this mean? Shall we assume that it means up to one-third of his own property? If so, then if he has occasion to perform three meritorious things he must spend his whole property? Said R. Zera: It means up to one-third in endeavoring to adorn the meritorious thing (*e.g.*, if there are two scrolls of Law, and one is more expensive than the other, he shall spend one-third more to buy the more expensive one). R. Assi questioned:

* The reason why this was not stated till now is that there should be no interruption in the discussion of R. Ishmael and R. Aqiba.

Does it mean one-third of the cheaper one, or does it mean one-third should be added? This question remains unanswered. In the West it was said in the name of R. Zera: Up to one-third he shall spend from his own (without expectation to be rewarded in this world), thenceforward from the Holy One's, blessed be He (*i.e.*, that part will be repaid to him in this world).

MISHNA *II.*: (The following is the rule:) In all that which I am charged with taking care of I have prepared the damage (*i.e.*, if damage was done it is considered that I was instrumental in doing it). If I prepare only a part of the damage I am responsible nevertheless for the whole, as if I prepared the whole. And only as to property which cannot be desecrated (but for that which is desecrated there is no responsibility), or property of persons governed by laws adopted by their community,* or such that has an owner, and at any place (the damage was done), except if done on the ground exclusively belonging to the defendant, or on that belonging to both together, the defendant and the plaintiff. If damage was done, the defendant must complete the payment of the damages with the best of his estates.

GEMARA: The rabbis taught: "In all that which I am charged with taking care of," etc. How so? If one intrusts a deaf man, a fool, or a minor with the charge over a pit, or an ox, and they cause damage he must pay for such damage, which is not so in case of fire (explained further on). What case is treated of here? when the ox was kept on a rope, or the pit was covered, equivalent to which in case of fire is as if it were live coals; and if you should ask why there should be a difference (between the former and the latter), (it may be said) in the case of the ox he is likely to get loosened, and in the case of a pit the cover is likely to slip off (and therefore the owner should have that in mind and bestow better care), but in the case of coal it is the reverse, for it is likely to get more and more extinguished. But according to R. Johanan, who said (elsewhere) that if one intrusts even a flame (to those stated above) he is also free (and consequently the statement above, "which is not so in case of fire," must be explained as meaning a flame), and in such a case the equivalent thereof here would be a loosened ox and an uncovered pit. Why should there be a

* This seems to be the true meaning of the expression "Bene Brith," and not, as some thought, that it means Israelites. See our introduction to this edition in our "History of the Talmud."

difference? There (in case of fire) the deaf man has so closely connected himself with the fire (*i.e.*, if he would not move it, it would remain stationary), that it is considered that he himself has done the damage (this is according to Rashi's second explanation, and it is stated elsewhere that if a deaf man, etc., do damage there is no liability), but here it is not so (for the ox or the pit did the damage without the aid of those mentioned).

The rabbis taught: There is a more rigorous rule in the case of the ox than in the cases of the pit and the fire, and *vice versa.* (How so?) The rigorousness of the rule in case of the ox is that he (the owner) pays the atoning money (when the ox kills a free man, and 30 shekels if a slave) which is not so in the case of the pit and fire. The rigorousness of the rule in the cases of the pit and the fire is that the pit is originally made to do damage, and the fire is considered "noxious from the beginning," which is not so in case of the ox. There is a more rigorous rule in the case of fire than in the case of the pit, and *vice versa.* The rigorousness of the rule in case of the pit, which is made originally to do damage, lies in that one is responsible if he intrusted it to a deaf man, minor, or fool, which is not so in case of fire, and the more rigorousness is in the case of fire, which has in its nature to move and to do damage, and is considered noxious in that it consumes everything whether fit or unfit for it, which is not so in the case of the pit. Let him also teach that the case of the ox is more rigorous because he is liable for damages to vessels (by breaking them intentionally either with the horn or with the foot), which is not so with the pit. The Tana enumerates some and leaves out others. Is then anything else left out that also *this* is left out? Yea, the case of concealed articles (*e.g.*, if an ox has kicked upon a sack containing vessels, or an ox carrying a sack containing vessels fell into a pit and the vessels broke, the owner is responsible for the vessels, which is not so in case of fire).

"*If I have prepared a part of the damage,*" etc. The rabbis taught: "How so? If one dug a pit nine spans deep and another one came and completed it to be ten spans deep, the latter is responsible (whether the ox falling into it was killed or only injured). Shall we assume that this is not according to Rabbi (who said further on that for damages both are liable)? Said R. Papa: The case is that the ox that fell in was killed (in which case Rabbi also agrees that the one who dug the last span must pay). R. Zera opposed: Is this the only case—is it not

the same if one left his ox in charge of five persons, and one of them left intentionally and the ox caused damage—is the one who left responsible ? And R. Shesheth also opposed, saying that there is another case when one added fuel to a burning fire, and the latter caused damage; the last one is responsible, and R. Papa himself opposed, saying there is also another case of the following Boraitha when five persons sit on a bench, and it does not break, and another one comes and sits down and it breaks, the last one is responsible (for the whole damage); and he himself explained it as it had been, Papa bar Abba (who was a heavy-weight man). Now, let us then see; in all those three cases how is it to be understood ? If without the last one no damage would have been caused, then is it self-evident that he is responsible ? And if even without him damage would have been caused, then what has he done that makes him liable ? (and therefore these illustrations cannot be cited, because in the case of the pit the one who dug it nine spans can say to the other : If you had not dug the tenth span the animal would not have been killed (as there is a tradition that a pit less than ten spans deep cannot kill), but only injured, and I would have had to pay only for the injury, but not for the whole animal). But finally how is this Boraitha, after all, to be explained ? (for the former two cases which are not Boraithas we do not care). It can be said that if he would not have sat down it would have not broken before the lapse of two hours, and he hastened it to break in one hour, in which case the first five can say to the last one: "If not for you, we would have remained sitting a little longer, and would have left (and the bench would not have broken)." But why should he not reverse the argument and say: "If you were not with me on the bench, it would not have broken at all ?" The case is that it broke while he was leaning on them. What is the difference ? Lest one should say that, as he caused the damage only by his strength (leaning) and not by sitting down, he should not be liable, he comes to teach us that one's strength is equivalent to one's weight of body.

"*I am responsible to pay the whole damage.*" It does not state "I am responsible for the damage," but "I am responsible to complete the compensation for the damage"; this is a support to what was taught by the rabbis: "The completion of the compensation for the damage." This is to teach that the plaintiff must trouble himself with the disposal of the carcass.

Whence do we deduce it? Said R. Ami: It is written [Lev. xxiv. 21]: "And he that killeth a beast shall make restitution for it" (yeshalmenah). Do not read "yeshalmenah," but read "yashlimenah," he shall complete her (*i.e.*, the plaintiff shall take the final trouble of disposing of it by sale and the defendant shall pay the balance of the damage). Hezkyah says, it can be deduced from the following passage [Ex. xxi. 34]: "And the dead beast shall be his," which signifies it shall be that of the plaintiff. So it was explained by the disciples of Hezkyah. "Thou sayest it belongs to the plaintiff"; perhaps the passage means that it belongs to the defendant? It was said: "It was not so." What does that mean? Said Abayi: If thou shouldst think that the carcass belongs to the defendant, it should have been written "an ox for an ox" [ibid., ibid.], and no more (and I would know that the defendant can have the carcass); why the addition of the above passage? Infer here from that the passage means that it shall remain the plaintiff's. Said R. Kahana to Rabh: Is that so, that without the addition of that passage it could be thought that it belongs to the defendant? Where is the common sense? Since if he (the defendant) has a number of carcasses he may give them to the other party (in payment of the damages), for the master said above: It is written [ibid.] "He shall '*return*'; that includes equivalents of money, and even bran." The more so the carcass in question, which is his own? This statement (as to who has to trouble himself with the disposal of the carcass) was necessary as to the loss in value of the carcass (*i.e.*, that from the time the animal was killed its owner is charged with its disposal, and if through his negligence it was not disposed of, and there resulted a loss in value, that loss is charged to the plaintiff).

Shall we assume that the Tanaim of the following Boraitha differ as to this case? It is written [ibid. xxii. 12]: "If it be torn in pieces let him bring it in evidence that it happened so by accident, and he will not be liable" (for a bailee for hire is not responsible for accident). Abba Saul, however, says it means he shall bring the carcass into court (to be appraised). May we not suppose that they differ thus (for we cannot suppose that they differ in case it was done by accident, for even Abba Saul must concede that a bailee for hire is not responsible in such a case, but they probably differ in a case where the bailee *is* liable): One holds that the loss in value is chargeable to the plaintiff, and the other holds that it is chargeable to the defend-

ant? Nay, both agree that it is chargeable to the plaintiff, but they differ as to the trouble of transportation of the carcass.

As we have learned in the following Boraitha: The anonymous teachers say: Whence do we deduce that the owner of the pit has to bring up the killed ox from the pit (at his expense)? It is written [ibid. xxi. 34]: "He shall make restitution in money unto the owner thereof; and the dead" (*i.e.*, he must give also the carcass, which cannot be done unless brought up from the pit). Said Abayi to Rabha: "How is this case of transportation of the carcass? Shall we assume that when in the pit it is worth one Zuz and when on the brink thereof it is worth four? Then this trouble is for his own benefit? Why the passages?" He answered him: "The case is that it is in either case not worth more than one Zuz" (and even then he must bring it up). But can there ever happen such a case? Yea, as people usually say: "A beam in the forest is worth one Zuz, and the same, although in the city, is also only of same value."

Samuel said: "(It is the custom of the courts that) no appraisement is made for a thief or robber (*i.e.*, if one stole an article, etc., and the same was broken, he does not return the broken parts and pay the difference in value, but must return good articles), but only in case of damages. And I, however, add also the borrower, and Aba (Rabh) agrees with me."

It was taught: Ula said in the name of R. Elazar: An appraisement is made for a thief and a robber. R. Papi, however, said: No appraisement is made. And the Halakha prevails that no appraisement is made for a thief and robber; but for a borrower, however, it may be made, according to R. Kahana and R. Assi. Ula said again in the name of R. Elazar: "A first-born (of a man) which was killed by an animal within the thirty days need not be redeemed." So also has Rami bar Hama taught: Because it is written [Numb. xviii. 15] "thou shalt redeem" one might think that this were so even if it were killed within the thirty days; therefore it is written [ibid., ibid.] "nevertheless" * to distinguish (that in case it was killed it need not).

The same said again in the name of the same authority: "Of brothers who have divided up (their estates of inheritance), that wearing apparel which they have on is appraised, but that which their sons and daughters have on is not appraised, because

* According to Leeser's translation.

they have no case in court, and therefore we do not trouble them to come." Said R. Papa: "Sometimes, however, even what *they* have on is also not appraised; this may be the case if the eldest brother was the manager of the estates, and he was dressed in better clothes for business purposes."

The same said again in the name of the same authority: "The Halakha prevails that debts are collected from slaves (because they are considered as real property). Said R. Na'hman to Ula: Did R. Elazar say so even when the slaves fall inheritance to orphans? Nay, only from him. From him? Would you say even from the only garment he has on? The case here is that he has hypothecated the slave, as Rabha said: "If one hypothecates his slave and thereafter sells him, the creditors nevertheless replevy the slave. If he has, however, hypothecated his ox, and thereafter sold him, the creditor cannot replevy him. Why so? Because when a slave is hypothecated people talk about it, and therefore the vendee is charged with notice, which is not the case with an ox." After R. Na'hman left, Ula said to those present: "So said R. Elazar: 'Even from the orphans (for a slave is as real estate).'" Said R. Na'hman (when he heard of this): "Ula avoided me (to state that in my presence, for fear I would cut him off with numerous objections)." Such a case happened in Nahardea and her judges collected a debt (from the slaves which fell an inheritance to orphans). In Pumbeditha such a case happened, and R. Hana bar Bizna collected it. Said R. Na'hman to them: "Go and return it, and if not I will collect it from your property." Said Rabha to R. Na'hman: "Ula, R. Elazar, the Judges of Nahardea, and R. Hana bar Bizna are all your opponents; according to whom then is your decision?" He answered: "I know a Boraitha, which was taught by Abimi: "A premonition (πρεοβολη) is effective as to land, but not as to slaves; personal property passes with land (if personal property is sold with land, and only the land is taken possession of, the personal property also passes), but not with slaves." (Hence we see that slaves are considered personal property.) Shall we assume that the Tanaim of the following Boraithas differ as to this case: If one sold slaves and land, and the vendee took possession of the slaves, the land does not pass. The same is the case if *vice versa*. Land and personal property, if the vendee took possession of the land, the personal property passes, but not *vice versa*. Slaves and personal property do not pass, unless the vendee takes posses-

sion of both of them, as one does not pass with the other. In another Boraitha it was taught that if one takes possession of the slaves the personal property sold therewith passes. Shall we not assume that they differ in this: One holds that slaves are considered real, and the other holds that they are personal property? Said R. Ika, the son of R. Ami: "Nay, all agree that a slave is personal property, and that Boraitha which states that it does not pass is correct, and that Boraitha that states that it does pass, treats of a case where the clothes which are on the body of the slave were sold." [And even when so, what of it? Is this then not considered a moving court, and with a moving court (personal property) does not pass? And if you should say that he was then not moving, did not Rabha say (Baba Metzia, Chap. I.) that if it does not pass when moving, it does not do so also when standing or sitting?] The Halakha prevails that it passes only when the slave is tied and cannot move.

But have we not learned in another Boraitha that if he takes possession of the land the slaves also pass? There is the case that the slaves are standing upon it. Would you say that the Boraitha which states that they do not pass means that they do not stand upon it? This would be correct according to the one who says that slaves are considered personal property, and therefore if they stand upon it they do, and if not they do not pass; but according to the one who says that slaves are as real property, why is it necessary that they should stand upon it? Did not Samuel say that if one convey to another ten different parcels of land located in as many different states, the taking possession of one of them acquires title to all? (Says the Gemara: What a question is this?) Even according to the opinion of him who says that slaves are considered personal estates, why is it needed that they should stand upon it? Have we not the tradition that if personal property be sold with real property, the former need not be upon the latter when possession is taken of the latter? What answer can you give to this, that there is a difference between personal estates that *are* movable and those that *are not*? Say the same thing here: There is a difference between movable and immovable real estate. Slaves are considered movable real estate, the body of the earth is one wherever it is (consequently all his lands are attached to each other).

"*Property which cannot be desecrated*," etc. R. Abba said: "An ox intended to be sacrificed as a peace-offering, which has

done damage, the (half) damage is paid out of his meat, but not out of those pieces prepared for the altar." Is that not self-evident, for those pieces are for the Lord ? It means to teach that the value of the half of these pieces is not collected from the other half of the flesh (*e.g.*, a non-vicious ox consecrated for a peace-offering, of the value of two hundred Zuz when slaughtered, that has killed another ox of the same value when alive, in which case according to law he must pay the damage out of half of his body. Now the pieces being burnt the value of the half body is diminished, nevertheless the amount diminished cannot be collected from the other half of the body). According to whom is this ? According to the rabbis, (who hold in case one ox has pushed another ox into a pit) that only the owner of the ox has to pay, but not the owner of the pit (although it is not sufficient); then this is self-evident. If it is according to R. Nathan, who in the above case holds that the owner of the pit must complete it, why should in this case the parts sacrificed be exempt ? This can be according to both R. Nathan and the rabbis; according to the rabbis, because we might say that the rabbis held so only where there are two distinct elements (the ox and the pit), but in this case where there is only one body, the plaintiff may say: I will collect my damage from any part I wish. And according to R. Nathan: In that case the owner of the ox may say to the owner of the pit: I found the ox in thy pit; whatever I cannot collect from that party, I will collect from thee. But in the case herein can he then say the flesh has done the damage, but not those pieces in question ? (Hence the statement.)

"*And that property that has owners.*" What does this mean to exclude ? We have learned in a Boraitha, this means to exclude ownerless property. How is the case ? If our ox gore an ownerless ox, who claims damages ? If the reverse is the case, let him go and take the ox ? The case is that (after he has done the damage) he was appropriated by some one. Rabhina said: "This means to exclude the case where he first did the damage, and then was consecrated by his owner, or declared ownerless (by driving him out)." So also we have learned in a Boraitha: "Further than that said R. Jehudah: Even if he damaged and then was consecrated, or his owner declared him ownerless he is exempt, as it is written [Ex. xxi. 29], 'and warning have been given to his owner, and he killeth a man or a woman,' etc., which signifies that during the killing, the bring-

ing of the suit and the making of the award there shall be one and the same owner."

"*Except on the property of the defendant.*" For he can say to him: "What has your ox to do on my premises?"

"*And on the property of both the defendant and the plaintiff.*" Said R. Hisda in the name of Abimi: In a partnership court one partner is liable to the other partner for damages done by the tooth and foot, and our Mishna is to be explained thus: "Except on property exclusively belonging to the defendant, where he is free, but on premises belonging to both the defendant and the plaintiff, if damage is done, the one doing it is liable." R. Elazar, however, makes them free and explains the Mishna that there is no liability for foot and tooth when it belongs to the plaintiff or to both the defendant and the plaintiff, and what is stated further on of one's liability refers to damage done by the horn, because partnership property is for that purpose considered a public ground. It is right according to Samuel (*ante*, p. 5), but according to Rabh, who says that the expression "ox" in the Mishna includes everything in relation thereto, what does this mean to include? It means to include that which the rabbis taught: "If damage is done the defendant is responsible." This means to include the depositary, the loan for use, the loan for hire, and the bailor for hire; if an animal has done damage on their ground, a non-vicious ox pays half and a vicious ox pays the full amount of damages. If the enclosure wall in good condition broke in in the night time, or it was broken in by burglars and (the animal) went out and has done damage, there is no liability." How was the case? Shall we assume that the ox of the bailor for hire has injured the ox of the bailee, let the bailor say to the bailee: If he should damage some stranger's property you would have to pay (because you are charged with taking care of him); why should I pay you when he has injured your ox? And if the reverse were the case (and still it is said that only one-half is paid), let the owner say to the bailee: If he were injured by an ox of a third person would you not have to pay me the full amount of damage? (because in the case of a loan for use he is liable for damages occurring by accident), now when *your own* ox has caused the injury you want to pay me only one-half? The case is that the ox of the bailor has injured the ox of the bailee, and the objection just stated can be explained that the bailee has agreed to take care that the ox shall not *be injured*, but not that he shall *do no injury to others*.

If so, how will be explained the later part which states that if the wall was broken in in the night-time, or the same was broken in by burglars, and the animal went out and did damage, he is free, from which is to be inferred that if in the daytime there is liability. Why should it be so? Did he then warrant against his injury to others? The Boraitha meant thus: If he has warranted against his injury to others he is liable only in the daytime, but not if in the night-time or by accident. Is that so? Has not R. Joseph taught: "In a partnership court and an inn, one is liable for damages done by the tooth and the foot?" Is this not contrary to the statement of R. Elazar? R. Elazar might answer: Do not the Boraithas themselves contradict each other? Have we not learned in another Boraitha: R. Simeon b. Elazar laid down four rules in regard to damages: "If done on ground exclusively belonging to the plaintiff and not to the defendant, the liability is for the whole (even if done by the horn and in case of a non-vicious animal); if *vice versa* there is no liability at all; if on ground belonging to both, as *e.g.* a partnership courtyard or valley, there is no liability for the foot and tooth, but for goring, pushing, biting, lying upon, and kicking, a non-vicious pays one-half and a vicious pays the whole. If on ground belonging to neither of them, as, for instance, a courtyard belonging to neither of them, there is a liability for the tooth and foot; for goring and biting, pushing and lying upon and kicking, a non-vicious ox pays one-half and a vicious pays the whole damage." Hence, we see that it is stated that in a partnership courtyard or a valley there is no liability for the tooth and the foot, and hence do the two Boraithas contradict each other. That one (which says there is no liability) treats of a courtyard which is held in partnership for both storing fruit and keeping oxen (in which case it is considered a partnership courtyard as to both the foot and the horn), and therefore in case of the tooth he is free, and in case of the horn he pays half, as it is equal to public ground; and that Boraitha taught by R. Joseph treats of a court held in partnership only as to fruit, but not as to oxen, in which case as to the tooth it is considered the exclusive ground of the plaintiff. It seems to be so also from the difference used in the wording of the Boraithas. In one case things similar to an inn (which is not used for oxen), and in the other—those similar to a valley (where generally oxen are pastured) are stated. Infer herefrom. R. Zera opposed: If there was a partnership for fruit, can it be called *another man's* field,

as required by Ex. xxii. 4? Said Abayi to him: "So long as it is not partnership as to oxen *it is* considered *another man's* field."

MISHNA *III.*: Damages are assessed in money, and are collected from what has a value of money; and it must be done before the court, and only on testimony of witnesses who are freemen, and they must be members of a community who have adopted a set of laws for their government; and women are on the same footing with men as to damages; both the defendant and the plaintiff must contribute (sometimes) toward the payment of the damages. (The whole Mishna will be explained further on in the Gemara.)

GEMARA: What is the meaning of "assessing in money"? Said R. Jehudah: It means the assessment shall be made by the Beth Din in money only, and this is explained in the following Tosephtha which the rabbis taught: "If a cow has damaged a garment (on the ground belonging to the owner thereof), and subsequently the garment of same owner lying on public ground was trod upon by the cow, and was damaged, it is not said, because each party is entitled to damage from the other, that both shall be relieved from paying each other at all, but the damages in each case are separately assessed, and the excess paid to the party due."

"*They are collected only from what is valued in money.*" The rabbis taught: The expression in the Mishna "what is valued in money" teaches that the Beth Din is not obliged to collect damages unless from real estates, but if the party entitled to be paid, however, has anticipated and has seized upon personal property the Beth Din may collect his claim from that property. How is it so inferred from the Mishna? Said R. Ashi: The expression "which is valued in money" means to say but real money itself, and all those things (personal property, slaves, evidences of debt, etc.) are considered money itself. R. Jehudah bar Hinna propounded the following contradiction to R. Huna, the son of R. Jehoshua: It states "what is valued in money"; this teaches that the Beth Din is not obliged to collect unless from real estates; and another Boraitha states: It is written [Ex. xxi. 34]: "(he shall give) unto the owner," which includes even equivalents of money, and even bran? (Hence a contradiction?) The case treated of here is that if they are to be collected from orphans' estates, for damages due from their deceased father, in which case they are to be collected from realty

only. If it is from orphans, what does the last part state—that if the party has seized personal property the Beth Din may collect therefrom? The case is as Rabha said in the name of R. Na'hman elsewhere, that he made the seizure during the lifetime of the father, so also is the case here.

"*On testimony of witnesses.*" This is to exclude the case when one admits his guilt, and thereafter witnesses appear, so that he is no more liable to pay a fine. This is correct according to the one who holds that if one admits his guilt and thereafter witnesses appear that he is no more liable to fine, but according to the one who says that in such a case he *is*, what does the statement in the Mishna mean to exclude? It is needed in regard to the latter part, which states that the witnesses must be freemen, to exclude slaves.

"*And the women are on the same footing,*" etc. Wherefrom is this deduced? In the schools of Hezkiah and R. Jose the Galilean it was taught: It is written [ibid. xxi. 28]: "If an ox gore a man *or a woman*"; this signifies that the Scripture made equal a woman and a man in respect to all crimes which are mentioned in the Scripture.

It was taught: The one-half damage paid (in case of a non-vicious ox); R. Papa said damages, because he is of the opinion that usually oxen require particular care and according to the law he would have to pay the whole damage, but as that happened only once the Scripture had pity with him and remitted one-half, and R. Huna the son of R. Jehoshua holds that it is a fine, because he is of the opinion that oxen usually are considered guarded and according to the law he would have to pay nothing at all, but the Scripture nevertheless fined him in order that he should take particular care. An objection was raised, based upon the Mishna. Both the plaintiff and the defendant sometimes contribute toward the payment of the damage. It is right according to the one who says that the half damages paid is considered damage; therefore sometimes the plaintiff must also contribute (*i.e.*, he takes less than he suffered), but if according to the one who holds that it is a fine, then he takes what he is not entitled to, how can you say that he is contributing? This statement is only in regard to loss in value of the carcass. But this was already stated in the first Mishna, as explained above, "to complete the damage." Infer that the owners are charged with the disposal of the corpse? This need be stated twice, once in case of a vicious and once in case of a

non-vicious animal; and it would not suffice to state it only once; for if it should be stated only in case of a non-vicious animal it would be argued that it is so because of that fact that he was not vicious, but in case of a vicious animal I would say it is not so; and if it would be stated only in case of a vicious animal, it could be said that it is so because the full amount of damage is paid, but in the case of a non-vicious animal it is not so, hence the necessity of stating it twice.

(An objection was made.) Come and hear: "The following is the rule: All those who pay more than actual (punitive) damage (*e.g.*, in case of killing a slave where thirty shekels are to be paid) do not pay so on their own admission (but it must be proved by other evidence). Is it not to be inferred herefrom that in case of paying less (than actual damages), one does pay so on his own admission? Nay, this means in case where the whole damage is paid. But how is it in case of paying less—is the same the case? Then why should it state, "the rule is that all those who pay *more*," etc.; why not state, "the rule is that all those who pay damages not according to the actual amount of damage done," which would make it clear as to those who pay more as well as to those who pay less? This objection remains, and the Halakha, however, prevails that the half damage is a fine. Can there be a settled Halakha in spite of an objection? Yea, for what is the reason of raising the objection, because it does not teach, "as much as they have damaged"? It could not state so because there is the half damage in case of raking up gravel, which is Mosaic that it is damage and not fine. Now, when the conclusion arrived at is that the half damage is a fine, when a dog consumes a sheep or a cat consumes a hen, it is unusual (and therefore considered the derivative of the horn and pays only one-half damage); such a damage is not collected in Babylon, where fines are not collected. But this is so only where those killed were big ones, but in case they were small ones it is usual, and it is to be collected in Babylon also; but if the plaintiff has seized upon the property belonging to the defendant (even in the former case), we do not compel him to surrender it, and also if he says: "Fix me a time to go to Palestine," his request may be granted. And if he does not go he is put under the ban. In either case we place him under the ban until the tort-feasors are removed, as stated further on (end Chapter IV.), in the name of R. Nathan.

MISHNA *IV.*: There are five cases which are considered

non-vicious and five which are considered vicious. A domestic animal is considered non-vicious to gore, to push, to bite, to lie upon, or to kick; the tooth (of an animal) is considered vicious to consume that which is fit for it; the foot is considered vicious to break everything on its way while walking; the vicious ox; the ox doing damage on the estates belonging to the plaintiff exclusively; and a man. The wolf, the lion, the bear, the leopard, and the *bardalis* and the serpent are considered vicious. R. Elazar says: When they are domesticated they are not, with the exception of the serpent, which is under all circumstances vicious.

GEMARA: From the teaching of the Mishna that "the tooth is considered vicious to consume," it must be inferred that the case is when the damage was done on the ground belonging to the plaintiff, and it is nevertheless taught "the animal is not vicious," which means not to pay the whole, but to pay half, and this is according to the rabbis, who say that the horn doing damage on the estate of the plaintiff is considered unusual, and pays only one-half of the damage; then according to whom would be the latter part? "The vicious ox and the ox doing damage on the estate of the plaintiff and the man," which means that they pay the whole damage, according to R. Tarphon, who says that the horn, although it is unusual for it to do damage on the premises of the plaintiff, still pays the whole. Then the first part of the Mishna will be according to the rabbis, and the latter part according to R. Tarphon? Yea, so it is, as Samuel said to R. Jehudah: Genius, do not trouble yourself about the explanation of our Mishna, and follow my theory that the first part is in accordance with the rabbis and the latter part is in accordance with R. Tarphon. R. Elazar in the name of Rabh, however, said that both parts are according to R. Tarphon, but the first part treats of a court that was separated for fruit only to one of the parties, and for oxen for both of them, and in such a case concerning "tooth" it is considered the premises of the plaintiff only, and concerning "horn" it is considered public ground.

Said R. Kahana: I have explained this Halakha to R. Zbid of Nahardea, and he rejoined: How can both parts of the Mishna be in accordance with R. Tarphon? Did not the Mishna state, "the tooth is vicious to consume what is *fit* for it," which signifies that it is vicious only as to what is fit for it, but not as to what is *unfit* (as then it is like the horn and pays only half), and R. Tarphon says plainly that even the horn pays the whole on the premises of the plaintiff?

Therefore said Rabhina: "The Mishna is not completed, and ought to read as follows: There are five cases which are considered non-vicious until they are declared to be vicious; the tooth, the foot, however, are considered vicious from the very beginning, and this is called the vicious ox; as to the ox doing damage on the estate of the plaintiff, the rabbis and R. Tarphon differ; and there are other vicious animals similar to those: the wolf, the lion, the bear, the bardalis, the leopard, and the serpent." So also we have learned plainly in a Boraitha.

"*And not to lie upon.*" Said R. Eliezer: "It is so only when it lies on large vessels, but if on small ones it is usual, and it comes under the law applying to the foot."

"*The wolf, the lion*, etc., *and the bardalis.*" What is a bardalis? Said R. Jehudah: It is a Nephrasa. What is a Nephrasa? Said R. Joseph: It is an Apa (Hyena).* Samuel said if a lion on public ground had caught an animal and ate it up alive there is no liability, for it is his usual way to do so, and therefore it is as if an ox had consumed fruit or herbs in public ground; but if he had first killed it and then ate it up he is liable, for it is not usual, and it comes under the law applying to the horn.

MISHNA *V.*: There is no difference between a vicious and a non-vicious animal, only that a non-vicious pays one-half of the damage, and only from the (money realized from the sale of the) body of the animal having done the damage; and a vicious animal pays the whole damage and from the best estates.

GEMARA: What is meant by "best estates"? said R. Elazar: It means, the highest of his own estates; and so it is said [II Chron. xxxii. 33]: "And Hezekiah slept with his fathers, and they buried him in the *best place* of the sepulchres," etc., and R. Elazar said, "best" means among the "highest of his own family"—that is, David and Solomon."

It is written [ibid. xvi. 14]: "And they buried him in his sepulchres, which he had dug for himself in the city of David, and they laid him in the couch which was filled with sweet odors and divers kinds of spices," etc. "And all Jehudah and the inhabitants of Jerusalem showed him honor at his death" [ibid. xxxii. 33]. Infer from this that his disciples were placed on his

* There is a long discussion in the Talmudical dictionaries as to the correct meaning of *bardalis*, which is mentioned in several places in the Talmud and seems to have different meanings; we translate it "hyena" according to Mr. Sheinhack in his "Hamashbir."

grave to study the law. R. Nathan and the sages differ as to how long it continued; one says it lasted three, the others say seven, and still others say it lasted thirty days.

The rabbis taught (referring to the passage just quoted) that it means the thirty-six thousand people who preceded the coffin of Hezekiah, the king of Judah, all their shoulders bared. So said R. Jehudah. Said R. Ne'hemiah to him: "Was not the same thing done upon the death of Ahab?" The great honor consisted in that the Holy Scrolls were placed on his coffin, and it was announced, "*That* one resting in the coffin has performed all that is written in *these* Scrolls." But do we not do the same thing at present? At present we only take the Scrolls out, but we do not place them on the bier, and if you wish you may say that at present we even place them on the bier, but do not say "that he performed," etc. Said Rabba bar bar Hana: I was once walking along with R. Johanan, and he said that at present we say even "he performed," etc., but we do not say "he taught" (that which is written in the Scrolls, which was said at the funeral of Hezekiah). But did not the master say: "The study of the Law is great because it causes action"? Hence we see that action has preference over study, and why was it said of Hezekiah that he "taught"? This presents no difficulty. Over learning, action has a preference; teaching, however, has preference over action.

R. Johanan in the name of R. Simeon b. Johai said: "It is written [Isa. xxxii. 20]: 'Happy are ye that sow beside all waters, freely sending forth the feet of the ox and the ass.'" It means that those who occupy themselves with the study of the Law and those bestowing favors on others will be rewarded with the inheritance of two tribes, as it is written [ibid., ibid.]: "Happy are ye that sow," and "sowing" means nothing else than charity, as it is written [Hosea x. 12]: "Sow then for yourselves after righteousness, that you may reap (the fruit) of kindness"; and by "water" is meant the Law, as it is written [Isa. lv. 1]: "Ho, every one of ye that thirsteth, come ye to the water" (*i.e.*, the Torah); "is rewarded with the inheritance," etc., means he overcomes his enemies as the tribe of Joseph, as it is written [Deut. xxxiii. 17]: "With them shall he push nations together to the ends of the earth," and he acquires understanding as the tribe of Issachar, as it is written [I Chron. xii. 32]: "And of the children of Issachar, those who had *understanding* of the times to know what Israel ought to do."

CHAPTER II.

RULES REGULATING THE PRINCIPLE OF VICIOUSNESS AND NON-VICIOUSNESS IN THE FOUR PRINCIPAL TORT-FEASORS ENUMERATED IN THE FIRST MISHNA.

MISHNA *I.*: What tendency makes the foot to be considered vicious ? * That of breaking (everything in its way) while walking. An animal has a tendency to cause breakage while walking in her † usual way. If, however, she were kicking (which is not her habit to do, and therefore considered a derivative of the horn), or there were gravel being kicked up from under her feet (which is sometimes her habit to do) and vessels were broken, one-half of the damage is paid. (In the case of gravel it is so by tradition; and the case is that it was done on the premises of the plaintiff.) If she stepped on a vessel and broke it, and the fragments thereof fell on another vessel and broke it, for the first vessel the full amount of the damage is paid (for it is the damage of the foot), but for the second vessel only one-half is paid (for it is the same as that of "gravel"). Cocks have a tendency to walk in their usual way and cause breakage. If, however, something was attached to their feet, or they were

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* See Gemara.

† We are compelled to use in our translation of this section for male and female animals the same terms used when speaking of human beings, for the following reasons : (*a*) The Bible translators use the same terms when speaking of animals, either of common or distinct gender, *e.g.*, see Leeser's translation (which we follow in the translation of the Talmud), Numb. xxii. 25, Exod. xxii. 5, as regards "ass," which is of common gender, also ibid., Exod. xxi. 29, Numb. xix. 3, as regards a distinct gender ; and so in many, many other places. Now, as the Mishna and the Gemara following use the word "animal" here in the feminine (probably for the reason that in those times of domestic animals the female was usually permitted to walk the highway without one directing her, which was not so with an ox, which was usually hitched to a wagon and in charge of a driver whose duty it was to take care that the ox did not step on articles lying in the way), and as "it" is usually used for the neutre gender, we could not very well use this term. (We follow strictly this rule as regards gender in all other places, to correspond with the original.)

(*b*) If we used "it" and "its" instead of the above terms, it would be very hard for the reader to comprehend the true sense of the discussions.

hopping and they broke vessels, only one-half is paid (the reason is explained further on in the Gemara).

GEMARA: Said Rabhina to Rabha: (Let us see.) Does not the term "foot" in the Mishna mean the foot of the animal; and does not the term "animal" mean its foot? Why, then, the change of the terms in the Mishna? He answered: Our Mishna begins with "foot," because the same term was used in a previous Mishna (page 27), (but the proper term is "animal").

The rabbis taught: An animal has a tendency to walk in her usual way and cause breakage. How so? An animal that entered upon the premises of the plaintiff and caused damage with her body, or with her hair while walking, or with the saddle which she had on, or with the freight she was loaded with, or with the halter placed in her mouth, or with the bell suspended from her neck; and an ass with his load the whole must be paid. Summachus says: In the case of gravel and in that of a swine raking in rubbish, if damage was done the whole must be paid. "Damage was done?" Is this not self-evident? Read therefore: If he *hurled it* and thereby did damage, the whole must be paid. "Gravel?" Where is this here mentioned? The Boraitha is not complete, and ought to read thus: In case of gravel, although it is in their nature to kick up, still half only is paid; and the same is the case if damage was done by a swine that was raking in rubbish and *hurled* some of it. Summachus, however, says: Gravel and swine pay the whole damage.

The rabbis taught: Cocks that were flying from one place to another, and broke vessels with their wings, pay the whole; if, however, the damage was caused by the wind produced by the wings, only half is paid (for whatever is not done directly by the body, but only by the force produced by the body, is considered to be on the same level with "gravel," and pays half). Summachus, however, holds that the whole must be paid.

Another Boraitha states: Cocks that were hopping on dough, or on fruit, and made the same dirty or punctured them, the whole damage must be paid. If they throw on them dust or gravel, half is paid. Summachus, however, holds that the whole must be paid.

Still another Boraitha teaches: If a cock were flying from one place to another, and the wind produced by the wings damaged vessels, only half must be paid. So we see that the above anonymous Boraitha is according to the Rabbis. Said Rabha: On the contrary, the last Boraitha is correct according to Sum-

machus (who opposes that it was a tradition that "gravel" pays only half) and says that the whole must be paid, because he holds that one's force is on the same level with one's body (and therefore damage done by the *wind*, caused by the wings, is equivalent to damages done by the wings themselves), but according to the rabbis, if it is considered as done by the body, then the whole must be paid; if it is not considered as done by the body, nothing is to be paid. Subsequently Rabha himself explained: It is undisputed that one's force is equivalent to one's body, but the force (wind) being unusual, it is considered as "gravel," for which there is a tradition that only half is paid.

Rabha said again: All that which in case of one having a running issue is considered a sufficient contact to make the article unclean, in case of damages pays the whole; and all that which in case of one having a running issue is not sufficient contact to make unclean, pays in case of damages half; and he means to teach us the case of the wagon carrying one having a running issue (*i.e.*, as in case of a wagon carrying one having a running issue which passes over vessels the latter become unclean, but if only "gravel" is kicked up from under the wagon and falls upon vessels the latter do not become unclean; so also in case of damages, in the first instance the whole, and in the latter instance only half is paid). There is a Boraitha supporting Rabha: "An animal has a tendency," etc. (as stated above, page 31), with the addition that a wagon carrying a person pays the whole damage.

The rabbis taught: "Cocks that were nibbling at a rope from which a water-pail was suspended, and severing the rope broke the water-pail, pay the whole." Rabha propounded a question: If an animal stepped on a vessel which did not break at once, but only rolled away for some distance and then broke, what is the law? Do we follow the origin and consider it to have been broken by the body (and the whole is paid), or do we follow the place where the breakage took place, and it is the same as in the case of "gravel" (and only half should be paid)? Come and hear: Hopping is not to be considered vicious; according to others, however, it may. Is it possible that damage done by hopping shall not be considered vicious (is it not in the nature of the cocks to do so)? Must it not be assumed that while hopping the vessel rolled away and then broke, and they differ on the following: One holds we trace the damage to the origin, and one holds that we consider only the place where the

damage occurred ? (Hence we see that in this case there exists a difference of opinion.) Perhaps (all agree that we consider only the place where the damage occurred, but) this is in accordance with Summachus, who holds that even "gravel" pays the whole. If so, how would you explain the latter part: "If a fragment flew off and fell on another vessel and the latter broke, for the first vessel the whole, but for the second only half must be paid ?" Now if it be according to Summachus, does he then hold to the theory of half damage ? And if you should say that he distinguishes between primary and secondary force (in case of the rolling of the water-pail it was primary force, but in that of the vessel damaged by the fragments of the pail it was secondary force), let the question of R. Ashi as to whether or not Summachus distinguishes between primary and secondary force be solved from this, that it is not on the same level with primary force ? We must, therefore, say that the above Boraitha is according to the rabbis. Infer from this that we trace the damage to its origin.

R. Bibi bar Abayi, however, said: In the case of the above water-pail the latter was rolling by the continuous original action of the cock (even in the moment of breaking).

Rabha questioned: The one-half damage paid in case of "gravel," is it paid out of the body of the tort-feasor, for we do not find anywhere that half damage is paid from the best estate; or is it paid from the best estate, for we find nowhere that damage done by usual means shall be paid out of the body of the tort-feasor ? Come and hear: "A dog that snatched and carried off a cake from the burning coals on which it was being baked to a barn, and there consumed the cake, and with the burning coal that stuck in the cake set fire to the barn, must pay for the cake the whole, and for the barn only one-half." Is the reason for that not because the damage of consuming the cake is that (directly) of the tooth, and the damage to the barn is only indirectly (remote), as in "gravel," and we have (nevertheless) learned in a Tosephtha in regard to this latter that the half damage is paid out of the body ? (Hence that it is paid out of the body ?) But, on the other hand, can it enter the mind that the reason for the liability in this case is because it is the usual case of "gravel," according to R. Elazar of the Boraitha, even if he concurs with Summachus that "gravel" pays the whole damage ? Do we find anywhere that such is paid out of the body ? We must, therefore, say that in the usual case of

"gravel" the damage is paid out of the body, but the case in the above Mishna is that the coal was handled not in the usual way, and R. Elazar holds in this respect with R. Tarphon, who said (page 50) that where damage was done by the horn in an unusual way on the premises of the plaintiff, the whole damage must be paid. In reality, however, it is not so. For what is the reason of the assertion that it is, according to R. Tarphon, because of the whole damage? We can say that R. Elazar holds, according to Summachus, that "gravel" pays the whole, and he agrees also with R. Jehudah, who says further on that the non-vicious element (even in case of viciousness) remains intact, and therefore when it is stated here that it is to be paid out of the body, it refers to that element (and in case of non-viciousness it is always paid out of the body).

Said R. Sama, the son of R. Ashi, to Rabhina*: (Even according to this theory) you can explain R. Jehudah's statement only in case of a non-vicious animal that became vicious, but how can you explain his statement when the animal is considered vicious from the beginning, as in the case of "gravel in the unusual way"?

We must, therefore, say (if you wish to explain that it is "gravel in the usual way") that R. Elazar held that the whole damage must be paid, according to him, only when it became vicious by doing so thrice, and they differ in the following: One holds that the theory of viciousness does not apply to gravel, and one holds that it does. If it should be so, then why did Rabha question whether there can be viciousness in case of "gravel in the usual way" (*i.e.*, as when we say that the first time one-half damage is paid, as in the case of the horn, so also it becomes vicious by being done thrice, as the horn), or viciousness cannot apply here, (for as it is a derivative of the foot (because it is natural) it is considered vicious from the beginning, and still pays only one-half damages); according to the rabbis it certainly is not, and according to R. Elazar it is? Rabha might answer: My doubt whether the theory of viciousness applies to gravel is according to the rabbis, who differ with Summachus; in our case, however, both the rabbis and R. Elazar

* The Rabhina mentioned here is Rabhina Zuta, a nephew of the first Rabhina, who is mentioned in Kethuboth 100*b*; for Rabhina, who was a disciple of Rabha and colleague of R. Ashi, died long before in the time of R. Sama, the son of R. Ashi. See Doroth Harishonim, Presburg, 1897.

agree with Summachus, and the reason why the rabbis hold that only half is paid, is because the cause was in the unusual way (in which case it is a derivative of the horn), and it does not become vicious, and the point of their difference is the same as that of the rabbis and R. Tarphon. We have heard R. Tarphon say only as to the whole damage, but have we ever heard him say that it must be paid out of the body? Yea, it is sufficient that the result derived from an inference be equivalent to the law from which it is drawn, and as this is a derivative of the horn, it cannot pay more than the principal or in another manner. But we know that R. Tarphon does not hold to the rule just stated? (There is no difficulty.) He does not hold to that rule only in cases where the rule of *a fortiori* is applicable (as explained further on, page 51), but where this rule is not applicable he *does* hold to the former rule.

R. Ashi questioned: According to the rabbis, who differ from Summachus and hold that in "gravel in the usual way" only one-half is paid, does the "unusual way" in gravel (as, for instance, if done by kicking up gravel) change it to the payment of one-fourth of the damage (*i.e.*, as the "usual way" is considered vicious, does the "unusual" way make it non-vicious to pay one-half of the amount paid in case of viciousness)? Can this not be solved from Rabha's question, whether there is or there is not viciousness in the case of gravel, from which it is to be inferred that it does *not* change it (for if it *does* change it to one-fourth, then in case of viciousness it would pay only half, how can Rabha doubt whether viciousness in this case pays the whole—does viciousness, then, pay more than double the amount of non-viciousness)? We can explain that Rabha was doubtful in both rules (both as to change and viciousness). If you will assert that in case of gravel the rule of change does not apply, can we apply to this case the rule of viciousness? This question remains unanswered.

"*If she were kicking,*" etc. R. Abba bar Mamal questioned R. Ami, and according to others R. Hyya bar Abba: If she (the animal) were walking in a place where it was impossible for her not to kick up gravel, and she kicked, and by so doing kicked up gravel and caused damage, what is the law? Shall we say that because it was impossible for her not to do it, it is, although done by kicking, considered the usual way (and pays half), or we do not consider it so, because still it was done by kicking? This question remains unanswered.

R. Jeremiah questioned R. Zera: If she were walking on public ground and gravel being kicked up from under her feet caused damage, what is the law? Is this a derivative of "horn" (because gravel pays half), and she must pay even if it was on public ground, or gravel is the derivative of "foot" (because it is done with the foot), and there is no liability if done on public ground? He answered him: Common-sense dictates that it is a derivative of the "foot." (He asked again:) If she were walking on public ground and kicked up gravel which fell on private ground causing damage, what is the law? He answered: If there is no starting, shall there be a resting (*i.e.*, the starting being on public ground, where there is no liability, shall the resting-place of the gravel be taken into consideration)? The questioner objected: Have we not learned elsewhere: If she were walking on the road and kicked up gravel, whether on public or on private ground, there is a liability. Shall we not assume that it means that both the kicking up of the gravel and the damage were done on public ground? (Now if kicking up gravel is compared with the "horn," therefore there is a liability, as in the latter case; but if it is a derivative of the "foot," why should there be a liability?) (He answered:) Nay, it means that the kicking was on public, but the damage was done on private ground. But did you not argue, "If there is no starting, shall there be a resting?" He answered: I retract my argument.

R. Jehudah the second and R. Oshiyah were sitting on the porch of R. Jehudah's house, and a question was asked: If she has done damage by shaking her tail, what is the law? (Is it considered to be in her habit to do so, and there is no liability, or not?) Said the other: Is there any duty on the owner to hold her by the tail when leading her? If so, why not apply the same argument to the horn, shall the owner hold him (the ox) by the horn when leading him? What comparison is this? In the latter it is not in his nature to do so, but in the former it is (and therefore it is a derivative of the "foot"). If it is in her nature to do so, then what is the question for? The question was only in case it was extraordinary shaking. (This question remains.)

"*Cocks have a tendency,*" etc. Said R. Huna: The statement that he pays only half and no more relates only to a case where the article got attached of itself; but if a human being attached it, the one who did so is liable to the whole damage

(for it is considered a "pit"). "If it got attached of itself," who is liable? If we assume that the owner of the *article* attached is liable, how was the case? If he kept the article with good care, then it was only an accident; if he did not, then it was wilful, and the full damage must be paid. We must, therefore, say that the owner of the *cock* is liable.

Why does he not pay the whole damage? Because it is written [Ex. xxi. 33]: "If a *man* dig a pit," which means to limit it to a human being only, and exclude the case of an *ox* digging a pit (in this case the article attached is considered "a pit" which the cock created), let the same argument apply even to the half damage, and let us say: "If a *man* dig a pit, but not if an *ox* dig a pit" (and let there be no liability at all). We must, therefore, say that our Mishna treats of a case where the cock has done the damage by hurling the article for some distance (in which case it is "kicking up gravel," and only half damage is paid), and the statement of R. Huna applies to the following case: "Of an ownerless article, R. Huna says if it got attached of itself there is no liability at all; but if it was attached by a human being, the one who attached it is liable." On what principle is he liable (for, after all, it does not resemble a "pit" in all respects, because a "pit" is stationary, while here it was removed from the place where it was tied on)? Said R. Huna bar Munoa'h: He is liable on the principle of a "movable pit," which is made so either by human beings or by animals (*e.g.*, if one places a stone in the public highway which, while lying in that place, did not cause any damage; and another person or an animal removed it from that to another place and damage was caused there, the latter is liable).

MISHNA *II.*: What tendency makes the tooth to be considered vicious? That of eating what is fit for it. An animal has a tendency to consume fruit and vegetables; if she, however, chewed up a garment or vessels, only half damage is paid. This is said only if on the premises of the plaintiff, but on public ground there is no liability. But if she derived any benefit therefrom, the value of such benefit is paid. How so? If she consumed from the middle of the public highway, the value of the benefit is paid; if from the sideways of the highway only, the amount of the damage is paid; if from the *front* of a store, the value of the benefit; if from *within* the store, only the value of damage is paid. (This Mishna is explained further on.)

GEMARA: The rabbis taught: The tooth has a tendency

to consume what is fit for it. How so ? For an animal that entered the court of the plaintiff and consumed food that is fit for her or drank liquids that are fit for her, the whole damage must be paid. The same is when a beast entered the court of the plaintiff and killed an animal, or consumed meat, the whole damage must be paid.

For a cow, however, that consumed barley and an ass that consumed beets, or a dog that was licking oil or a swine that devoured meat, the whole damage must be paid (although it is not their usual food). Said R. Papa : Now that you lay down the rule that an article consumed which constitutes the food of the consumer only in case of unusual necessity is considered food; for a cat that devoured dates and an ass that consumed fish, the whole must be paid. It happened that an ass consumed a loaf of bread contained in a basket and chewed up the basket, and R. Jehudah decreed that the whole be paid for the bread and half for the basket (because the former is in his habit to eat and the latter not). Why so ? Is it not in his habit to chew also the basket while eating the bread ? The case was that he first consumed the bread and then chewed up the basket. Is then bread the usual food of cattle ? Have we not learned: "If she consumed bread, meat, or cooked food, half is paid" ? Shall we not assume that it treats of cattle ? Nay, it means a beast. If so, then it is in its habit to eat meat ? The case is that the meat was roasted. It can be explained also that the meat was raw, but that the animal was a deer. And if you wish to explain it that it treats of cattle, then the case was that the food was placed on the table (which is unusual for cattle to eat from). It happened that a goat, noticing beets on the top of a barrel, climbed up and consumed the beets and broke the barrel, and Rabha ordered to pay the whole for both. Why so ? Because as it is in her habit to consume beets, so it is also her habit to climb up the barrel. Ilpha said: An animal being on public ground, that extended her neck and consumed some article from the back of another animal, is liable. Why so ? Because the back of the other animal is considered as the plaintiff's premises. Shall we assume that he shall be supported by the following Boraitha: "When his basket was placed on his back and an animal extending her neck reached the food therein and consumed it, it is to be paid for" ? Nay, the case is as Rabha said, that it was reached by the animal jumping at it, so also was the case here, viz., by jumping. Where was Rabha's explanation taught ?

On the following statement of R. Oshiyah: An animal on public ground, if she has consumed while walking there is no liability, but if she has done so while standing in one place there is a liability. (And it was questioned): Why is this so ? Is it not usual for an animal also to stand in the public highway ? Said Rabha: R. Oshiyah meant to say if the animal jumped. R. Zera propounded a question: If it was rolling, what is the law ? To what case has R. Zera reference ? If the animal was standing on private ground and the article was rolling toward the private ground.* (Do we follow the place where it was consumed, and there is no liability, or do we follow the place wherefrom it was removed, and there *is* a liability ?)

Come and hear: " R. Hyya taught: A bundle of food being placed partly within and partly without (private premises), if the animal consumed that portion placed within, there is, and if that portion placed without, there is no liability." Shall we not assume that it was rolled in (*i.e.*, that the whole was consumed, and it was rolled wholly in or wholly out, respectively ; hence, that we follow the place of consumption) ? Nay, R. Hyya taught so only in long-leafed grass (in which case every leaf is partly within and partly without the premises, and as soon as one end is touched the other goes after it, and therefore we follow the place of consumption, but not so in case of grain).

"*If she chewed up a garment*," etc. To what part in the Mishna has this reference ? Said Rabh: To all parts. Why so ? If one does an unusual thing (as in this case the placing of a garment in public ground), and another does an unusual act to that thing (as in this case the chewing up of the garment by the animal), there is no liability. Samuel, however, says this was taught only of fruit and vegetables, but for garments and vessels there is a liability. Resh Lakish, however, concurs with Rabh (because he adheres to his theory further on, Chap. III., Mishna 6.)

"*If she derived benefit*," etc. How much ? Rabba said the value of hay. Rabha said the value of cheap barley. There is a Boraitha in accordance with Rabba, namely: " R. Simeon b. Jo'hi says: Only the value of hay or straw is paid, and no more." There is another Boraitha in accordance with Rabha, namely: " If she derived benefit, she pays as much as the value of the benefit. How so ? If she consumed a kabh or two, not the

* According to Maimonides and others.

full value is paid, but only so much as one requires to feed his animal on food fit for her, although he is not in the habit of using such food. Therefore (as the fitness of the food is taken into consideration) if she consumed wheat or other food injurious to her, there is no liability (if on public ground)."

R. Hisda said to Rami bar Hama: I regret that you were not in our neighborhood the other evening when very acute questions were asked of us. What were they? Thus: One who takes up his dwelling in the court of his neighbor without the latter's knowledge, must he, or must he not, pay rent? How was the case? If the court was not to be let, and the dweller was such that he did not need to rent any (*e.g.*, if he had a dwelling of his own, or could get one without paying rent), then the one derives no benefit and the other suffers no loss? And if the court was to be let and the dweller needed a dwelling-place, then one does derive benefit and the other suffers loss (and why should no rent be paid)? The case was where the court was not to be let, but the dweller needed one. How is it? Can the dweller say to the court-owner: "What loss have I caused you?" Or can the court-owner say to the dweller: "It does not matter, for you derived benefit at any rate"? And he answered him: For this there is a Mishna. Where is that Mishna? He said to him: If you will render me some services, I will tell you where it is. He took off his coat and rolled it together for him. He then said: It is the above Mishna which states that if any benefit was derived the value thereof must be paid. Said Rabha: How secure and careless does the man feel that knows that the Lord helps him. (See Yomah, page 31, a similar saying in the name of R. Huna.) He accepted the Mishna as a case similar to the one above, when in reality the facts of the Mishna are different from those of the case above, as in the case stated in the Mishna one derives benefit and the other suffers damage, while in his case one derives benefit and the other does not suffer any loss.

[What could Rami bar Hama say to that? Generally, one who places fruit on public ground renounces ownership of it (and therefore there is no loss).]

Come and hear: R. Jehudah said also that one who occupies his neighbor's court without the latter's knowledge must pay rent. Infer from this that in case one derives benefit, although the other suffers no loss, there is a liability? Nay, there it is different; it treats of a new house, the walls of which become soiled

from use (and this is considered a loss to the owner). (Finally) this question was sent to the school of R. Ami, and he answered: What has he done, what loss has he suffered, or what damage has he caused? Said R. Hyya bar Abba: Nay, we have still to consider this matter (as the soiling may be considered a damage). Afterward they sent to him (to R. Hyya b. Abba) for his decision in this matter, and he said: They continue sending me this question; if I could find any reason to decide this, would I not have answered?

(In reference to above question) it was taught: R. Kahana said in the name of R. Johanan: He need not pay any rent. R. Abbuhu said in the name of the said authority that he need pay rent.

R. Abba bar Zabda sent a message to Mari bar Mar to ask R. Huna for his decision in the above matter. In the meantime R. Huna departed life. Said Rabba, his son: So said my father and teacher in the name of Rabh: He need not pay. (He also said): One who rents a house from Reuben must pay the rent to Simeon. How does Simeon come in here? He meant thus: If the house, in which he was living there at the time, was sold to Simeon, the rent must be paid to Simeon (although Simeon had no knowledge that he was occupying the house). Could, then, R. Huna say two things which contradict each other? There is no contradiction, because in the latter case the occupant intended to pay for its use. The very same case was taught by R. Hyya bar Abin in the name of Rabh, and according to others in the name of R. Huna. R. S'horah said in the name of R. Huna, quoting Rabh: One who dwells in the house of his neighbor (which was unoccupied and located in an unsettled district) without the owner's knowledge need not pay any rent, because the non-occupation causes damage, as it is written [Is. xxiv. 12]: "And in ruins is beaten the gate" (*i.e.*, if unoccupied the gate becomes ruined, and therefore the owner of the house derives benefit from the occupation). Said Mar bar R. Ashi: I once saw such a house which was damaged and looked as if gored by an ox. R. Joseph assigned another reason, viz., a house which is inhabited lasts longer (for the inhabitants make all the repairs necessary). What is the difference between these two reasons? There is a difference when the house is used for storing wood and straw.*

* Rashi explains this that the owner of the house used it for storing wood and straw, and the tenant lived in the same place used for such storage; and then as to "ruin," there is none, for it is being used; but as to repairs, the owner would not see

A certain person erected a palace on the ruins belonging to orphans, and R. Na'hman collected the rent (for the use of the ruins) from the palace. Should we assume that R. Na'hman holds that one who dwells in the house of his neighbor without the knowledge of the owner must pay rent? In this case the ruins were previously occupied by ancients who used to pay a nominal rent to the orphans, and R. Na'hman ordered Carmines to go and compensate the orphans, which order was disregarded by him, and therefore R. Na'hman collected it from the palace.

"*How does she pay for the benefit,*" etc. Said Rabh: This was taught only when she turned around her head (from the public highway to the sideway), but in a case where one leaves a portion of his own ground open to the public highway (and an animal enters upon it while walking on the public ground and consumes fruit stored there) there is no liability. Samuel, however, says: Even in the latter case there is a liability. Shall we assume that they differ as (to the liability of a) pit located on one's own ground (where the owner renounced his ownership of the ground, but not of the pit)? Rabh holds that (the owner of the pit) is liable (and in this case in question the fruit is considered a "pit," and the ground being ownerless, it is considered public ground, and therefore he ought not to have done so, and for that reason there is no responsibility for consuming it). Samuel holds that for the pit in question there is no liability (consequently he was allowed to place his fruit there, and therefore the consumer is liable). Nay, Rabh may answer, I hold in case of a "pit on one's own ground" that there is no liability; but why is here the consumer liable? Because the owner of the animal can say: You cannot have so much privilege as to place your fruit in the immediate neighborhood of public ground and hold my ox to liability. And the same is the case with Samuel, who may say: In case of a "pit on one's own ground," I hold that there is a liability, but here, if even it would be right (for the owner of the animal) to say that the ox could not be aware of the pit (and therefore if he should be damaged the owner of the pit would be liable), the case is different, because

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what repairs are necessary, as he does not live there; consequently, in such a case, according to R. Joseph, he need not pay, and according to R. S'horah he need pay. We, however, would say, that the Gemara means that it was used for storing wood and straw by the stranger, and, on the contrary, according to Rabh, he need not pay, for the house is no more vacant; and according to R. Joseph he need pay, because he will not care to make repairs. We leave the choice to the reader.

the fruit was exposed to view and the ox could not escape noticing it (and therefore if the ox should be injured the owner of the fruit would not be liable ; the owner of the ox, however, is liable for the fruit consumed by his ox, because he derived benefit from another's property). Shall we assume that in the above case (turning the head) the Tanaim of the following Boraitha differ: "If an animal consumed from the middle of the highway, the value of the benefit derived is to be paid; if from the sideways, the value of the damage is to be paid. Such is the dictum of R. Meir and R. Jehudah; R. Jose and R. Elazar, however, hold that it is not her usual habit to consume, but only to walk (on the sideway, and therefore there is a liability). Now, shall we assume that R. Jose concurs with the first Tana, but they differ only as to "turning the head," viz.: The first Tana holds that in that case she also pays only the value of the benefit, and R. Jose holds that she pays the value of the damage done (and hence that the Tanaim differ)? Nay, it may be said that all agree, that in case of "turning the head" it is either according to Rabh or according to Samuel, but they differ here as to feeding in *another* man's field [Ex. xxii. 4]: "And he lets his beasts enter, and they feed in *another* man's field."

One holds that it means to exclude *public* ground (and therefore if she consumed from the middle of the street there is no liability), and one holds it means to exclude the ground of the defendant. "The ground of the defendant?" (Why should there be any liability?) Let the defendant say to the plaintiff: What right had you to place your fruit upon my ground? We must therefore say that they differ in cases stated by Ilpha and R. Oshiyah (see *supra*, page 38). (R. Meir holds, if in the middle of the highway only the value of the benefit is to be paid in both the case stated by Ilpha and that stated by R. Oshiyah. And R. Joseph maintains that it is not her usual habit, etc., and holds to Ilpha and R. Oshiyah.)

MISHNA *III.*: A dog or a goat that jump down from the top of a roof and break vessels pay the whole damage; for they are vicious (as to jumping, and it speaks of a case on the premises of the plaintiff). A dog that snatched a cake (from the coal on which it was baked) and carried it to a barn and there consumed the cake and (with the burning coal stuck in the cake) set fire to the barn, the whole for the cake, but only one-half damage for the barn is to be paid (as explained further on in the Gemara).

GEMARA: The Mishna states a case of jumping, because in case of *falling* down there is no liability; we see then that the Tana holds that where the beginning of an act is wilful (in this case, allowing the goat or dog to be on the top of the roof), but the end is only by accident (the falling down, which he could not anticipate), there is no liability. We have so also learned in a Boraitha: "A dog or goat that jump down from a roof and break vessels pay the whole damage; if, however, they *fell* down there is no liability." The rabbis taught: "A dog or a goat that jump up from below, there is no liability; if, however, they jump down from above there is. A human being or a cock, however, that jump are liable in either case."

"*A dog that snatched,*" etc. It was taught: R. Johanan said: One's fire is considered one's arrow (*i.e.*, one who allows a fire started by him to spread and do damage is liable on the same principle as one who shoots from a bow when the arrow does damage). Resh Lakish, however, said: The liability is because the fire is considered one's property. There is a contradiction from our Mishna: "A dog that snatched a cake," etc. It would be right according to the one who holds that one's fire is considered one's arrow, for in this case it is the dog's arrow (and the dog is the person's property); but according to the one who holds that it is because the fire is considered one's property, in this case it is the property of the owner of the dog. Resh Lakish may say: The case was that he flung it, in which case he is liable for the cake to the full amount; for the place on which the coal fell to one-half (for it is unusual); and for the barn he is not liable at all (for the liability for one's fire is because it is his property, and in this case it is not). And R. Johanan may explain that he placed (the cake and the burning coal) in the usual way, and therefore for the cake and the place where the coal lay he is liable to the full amount, but for the barn he is liable only to one-half. Said Rabha: There are both a biblical passage and a Boraitha in support of R. Johanan, viz., a biblical passage, for it is written [Ex. xxii. 5]: "If a fire *break* out"; "break" means if it does so of itself, and still "he that kindled the fire shall surely make restitution" [ibid.]. Hence we see that one's fire is considered one's arrow. A Boraitha: As we have learned: "The passage starts out with damages done by one's *property* (the above-quoted passage, which means 'break' out of *itself*) without the aid of some person, and ends with the damages done by one's *own person*: 'He that kindled,' etc. [ibid.,

ibid.], to teach that the liability for one's fire is because it is considered his arrow."

Rabha said again: It was first a difficulty to Abayi: It is known that there is no liability for damages done by fire to concealed articles; how can such a case be found in the biblical law, according to those who hold that fire is considered one's arrow? Afterward he himself tried to explain it thus, that the case is where a fire started in one court and the fence of the court fell in, not by reason of the fire (but by some other reason), and on account of this the fire spread to another court and caused damage, in which case the "arrow" ceased to be such at the boundary of the first court (for at the time the fire was started it was unable to spread outside of the court, before the falling in of the fence).

If so, then the same thing may be said also in case of unconcealed articles? We must, therefore, say that the one who holds that the liability is because it is his arrow, holds that it is so because the same is also his property, and that in this case he had sufficient time to repair the fence (before the fire spread) but did not do so; and although not liable for starting the fire, he is liable for allowing it to spread, in which case it is the same as if he had kept his ox in a stall without locking the door. If it should be so, that the one who holds that the liability for one's fire is because it is his arrow holds also of the other theory, that it is considered his property (and if not liable for one reason is liable for the other reason), then what is the difference between R. Johanan and Resh Lakish? The difference is as to the liability for the four things (see above, page 6). (According to the one who holds that it is because it is his arrow also, there is a liability; and according to the one who holds that it is because it is his property, there is none.)

"*For the cake,*" etc., "*pays,*" etc. Who is liable—the owner of the dog? Why should also the owner of the coal not be liable? (For according to both R. Johanan and Resh Lakish the liability is because it is his property, and according to R. Johanan, who holds that half must be paid for the barn, the owner of the coal pays the other half; and according to Resh Lakish, who holds that there is no liability at all for the barn, let the owner of the coal be liable for the whole?) The case is that the owner of the coal took good care of it. If so, how could the dog get hold of it? The case is that the dog dug under the door and in such a way gained access. Said Mari, the son of

R. Kahana: From the fact that the owner of the dog must pay the whole damages is to be inferred that ordinary doors are considered unsecured in regard to dogs (and it must not be considered unusual so as to pay only half).

Let us see: The Mishna states that the dog has consumed the cake, etc. Consumed where? If not on the premises of the owner of the cake, why must it be paid? This is not "in *another* man's field" [Ex. xxii. 4] (which means on the premises of the plaintiff). We must, therefore, say that it was at the barn of the cake-owner. (From the fact that he must pay for the cake) then infer that the mouth of an animal (consuming something on the premises of the plaintiff) is considered as it is yet in the court of the plaintiff. (As the case stated in the Mishna was that the dog kept it in his mouth from the time he picked it up until he reached the barn, and it was not considered that it was on the premises of the defendant, although the dog was his property,) for if it would be considered as the premises of the defendant, he could say to the plaintiff: Your bread was all the time in the mouth of my dog, which is my property, and there it was consumed; why, then, shall I pay? We say infer, because a question was actually raised as to this. And there could no such question arise if it were certain that the mouth of the animal is considered the premises of the defendant; and besides, there could arise no case in which there would be a liability for damage by the tooth, as in order to consume it it must necessarily be taken into the mouth. Said Mari, the son of R. Kahana: If there could be no direct case of "tooth," there could arise a case which is its derivative, as, for instance, when the animal was rubbing against the wall for her own benefit and thereby did damage, or she rolled over fruits for her own benefit, and made them dirty (which cases are derivatives of the "tooth"). Mar Zutra opposed: But is it then not written in the Bible that there must be complete destruction [I Kings xiv. 10]: "Sweeps away the dung till there be *nothing* left"? Which is not the case here (as the wall or the fruit is still in existence). Said Rabhina: It can be explained that by rubbing against the wall she obliterated *completely* the engravings thereon; (and in case of the fruit), said R. Ashi, that by rolling over the fruits she sank them into the mud (so that they could not be removed).

There were certain goats belonging to the family of Tarbu that were doing damage to the property of R. Joseph, and he said to

Abayi: Go and tell their owners to keep them in safety. The latter answered him: If I do so they will tell me that you should put up a fence on your ground. [If one must put up a fence upon his premises in order to prevent consumption of, or otherwise damaging, his fruit, how can there be a case of liability for damage by the "tooth," for which the Scripture makes it plainly liable? That may be in case she dug under the fence or the fence fell in in the night-time (if there was no opportunity of repairing it).] Announced R. Joseph, and according to others Rabba: It shall be known to all those who are ascending to Palestine and to all those who are descending to Babylon that if those goats that are kept for slaughter during the market days do damage, their owners shall be warned twice or three times. If they listen well and good, if not the goats are to be brought to the slaughter-house, even before the arrival of the market days, and the owners are to be paid their market value of that day.

MISHNA *IV.*: What is considered a non-vicious and what is considered a vicious one? A vicious ox is one that has been warned three days. A non-vicious one is one that abstains (from goring) for three days. Such is the dictum of R. Jehudah. R. Meir, however, said a vicious ox is one that had been warned thrice, and a non-vicious one is one that, when children pat him on the back, does not gore them.

GEMARA: What is R. Jehudah's reason? Said Abayi: It is written [Ex. xxi. 36]: "In time past" (in the original: "*Mi*-tmol, Shilshom"). It could have been written "tmol" (yesterday), and then would have counted only once, but it is written "*Mi*-tmol" (since yesterday), therefore it signifies twice; when "shilshom" is added it signifies thrice, and then follows, "and his owner hath not kept him in" [ibid.], which means that viciousness begins upon goring the *fourth* time (for the third time, however, only half is paid). Rabha, however, is not so particular about the addition of "mi" to "tmol," and therefore this word signifies only once, and the word "shilshom" signifies twice, hence "and his owner," etc., means the *third* time, when the ox becomes vicious, and he pays the whole damage.

And what is the reason of R. Meir's theory? This is explained in the following Boraitha: R. Meir said: (Draw an *a fortiori* conclusion): If he gored at long intervals (only once a day), he is considered vicious on the third time; so much the more if he had gored thrice in one day he must be considered

vicious. They rejoined : There is no conclusion *a fortiori* to be drawn here, as there is a similarity in the case of a woman who has a running issue, who is unclean for seven days only when she notices the disease three days in succession once a day, but if she notices it three times or more in *one* day she has to wait only one day. He said again: (From this nothing can be inferred) as the verse made this case an exceptional one by the words "*And this,*" etc. [Lev. xv. 3], which signify that it is so only in this case, and no others can be compared to it, for we see that in this case the verse made it, in case of a man, depend upon the number of times of noticing of the issue, while in the case of a woman, it made it dependent upon the number of days.

The rabbis taught: What ox is considered vicious ? One that has been warned for three days; and a non-vicious one is one that is patted by children and does not gore; such is the dictum of R. Jose. R. Simeon, however, holds that a vicious ox is such as has been warned thrice (even in one day), and the statement as to the three days is only as to abstaining (that is, if after having been warned three times he abstains for three days from goring, then he is again considered non-vicious). Said R. Na'hman in the name of R. Ada bar Ahba: The Halakha prevails as stated by R. Jehudah in regard to a vicious ox, and according to R. Meir in regard to a non-vicious ox, for the reason that R. Jose agrees with them. Said Rabha to R. Na'hman: Let the master say that the Halakha prevails according to R. Meir in regard to a vicious ox, and according to R. Jehudah in regard to a non-vicious ox, for the reason that R. Simeon agrees with them in both. He rejoined: I concur with R. Jose, for he has always his valid reasons.

The schoolmen propounded a question: The three days in question, are they as to make the ox vicious; but the owner may be liable for a vicious one in one day; or are those three days also as to the owner ? In what case can there be a difference ? If there appear three different sets of witnesses in one day (and testify as to three gorings in three days), if those three days are as to the ox, then he becomes vicious; but if they are as to the liability of the owner, then the latter can say all the three sets appear only now (and the Scripture requires that they shall appear in three days).

Come and hear: " An ox does not become vicious until testimony is given in the presence of both his owner and the court. If in the presence of only one of them, he does not become

vicious until it is in the presence of both. If two witnesses testified as to the first goring, two as to the second goring, and two as to the third (each goring being at a different place, time, and man), we have then three sets of witnesses, but still all the three sets are considered one as to be proved in collusion. If one set is found collusive there is still the testimony of the other two sets, and neither the owner is liable to pay for a vicious one nor are his witnesses liable (to pay the other half for viciousness). The same is if also the second set proved collusive. If, however, all the three sets prove collusive, they are all considered as one set, and all of them are to pay the one-half for viciousness, and that is meant by the passage [Deut. xix. 19]: Then shall ye do unto him, as he had purposed to do unto his brother,'' etc. Now let us see. If the three days are as to the ox (but the owner may become liable if testimony be given to him thrice in one day), it is correct that the witnesses are liable only when all the three sets proved collusive (for it may be that the one who was injured brought all the witnesses to testify to the three gorings, and each set knew of the other and to what they were to testify, and therefore they cannot say that they intended to make him pay only one-half); but if you should say that the three days are as to the owner also, why should the first set of witnesses (if proved collusive) be liable? Let them say that they did not know that others would come in two or three days later to testify as to make him vicious. Said R. Ashi: When I read this Halakha before R. Kahana, he said to me: Even if the three days are explained to be in regard to the ox only, would it then be correct, for (if even the first set cannot argue that they had no knowledge of the testimony to be given by the others, for they knew that on their own testimony he could not be made vicious) the last set can say: How should we have known that all these witnesses before the court were going to testify as to this case; we intended to testify so as to make him pay only one-half? We must, therefore, say (that if the three days refer to the ox) one set of witnesses gave the other a hint as to what they were going to testify. R. Ashi said: The case is that they all come together and therefore are supposed to know of the testimony of one another. Rabhina said: It may be that the witnesses knew the owner, but did not know the ox (and therefore by coming to testify they meant to make the ox vicious and must have known that there was already testimony given). If they do not know the ox,

how can they make him vicious? They testify and warn the owner that there is a "goring" ox among his cattle, and therefore that he should take care of *all* his cattle.

The schoolmen propounded the following question: For one who sets his neighbor's dog on a third person, what is the law? The first one is surely not liable (for he was only instrumental in the injury), but the owner of the dog, is he or is he not liable? Can he say: What did I do in this matter? Or can we tell him: Having known that your dog is capable of being set on, you should not keep him? Said R. Zera: Come and hear. It is stated in our Mishna: What is considered a non-vicious ox? One who when patted by children does not gore them, but if he does gore he is liable (although it was caused by the patting of the children). Said Abayi: Is this, then, so stated in the Mishna? Perhaps the Mishna meant that if he did gore he is no more considered entirely non-vicious, but that he is not liable for *that* goring. This question remains undecided. Rabha said: If you should say that one who sets on his neighbor's dog is liable, it would follow that, if in such a case the dog turned on the one who sets him on and bit him, the owner is not liable. Why so? As stated above, page 39, that one who does an unusual thing, etc., which is the same in this case. The man was wrong in setting on the dog, and the dog should not bite him. Said R. Papa to Rabha: It was taught in the name of Resh Lakish in accordance with your theory in the case of two cows (see *post*, page 70). Rejoined Rabha: I in such a case hold him to liability, for the reason that we can say to him: You had permission to step upon me, but had you then also permission to kick me?

MISHNA *V.*: "An ox that did damage on the premises belonging to the plaintiff," stated in Chapter I., Mishna IV.; how so? If he gored, pushed, bit, lay down on, or kicked while on public ground, he pays half; if while on the premises of the plaintiff, R. Tarphon holds the whole; the rabbis, however, say one-half. Said R. Tarphon to them: (Are we then not to draw an *a fortiori* conclusion:) In a case in which the law is lenient with the "tooth" and "foot" on public ground, making them not liable, it decrees rigorously if the same happened on the premises of the plaintiff, namely, that the whole must be paid; in a case where it decrees rigorously that the "horn" on public ground must pay half, is it not a logical inference that we ought to strictly adjudge the same, if on the premises of the plaintiff,

liable for the whole ? They said to him : It is sufficient that the result derived from the inference be equivalent to the law from which it is drawn, viz., as if on public ground only half, so also if on the premises of the plaintiff. He rejoined: " I also do not infer " horn " from " horn," but I infer " horn " from " foot," and I reason thus : if in cases in which the " tooth " and " foot " were dealt with leniently if on public ground, the " horn " was dealt with rigorously, is it not a logical conclusion that the latter shall be rigorously dealt with in cases where the former were also so dealt with ? They rejoined again : It is nevertheless sufficient that the result derived from the inference be equivalent to the law from which it is drawn.

GEMARA: Did R. Tarphon ignore the theory of " It is sufficient," etc.? Is, then, this rule not a biblical one ? As we have learned in the following Boraitha : " An *a fortiori* conclusion must be considered biblical. Where is it to be found in the Bible ? It is written [Numb. xii. 14] : ' And the Lord said unto Moses, if her father had spit in her face would she not be ashamed seven days ? ' So much the more if it is toward the Shekhina, it must be fourteen days ? But there is a rule that it is sufficient that the result derived from the inference be equivalent to the law from which it is drawn." (Hence we see that the rule of " It is sufficient " is also biblical.) R. Tarphon does not hold to that rule only where an *a fortiori* argument can refute that inference, but where there is no such refutation he does, viz., in the Bible the seven days of the Shekhina are NOT written ; only by an *a fortiori* argument we set it to be fourteen days, and therefore, by the rule above stated, we equal it to the father's case, but in our case the half damage *is* written in the Bible and applies also to the premises of the plaintiff, and by an *a fortiori* argument we only add another half to it. Now if you should apply the rule above stated, then the *a fortiori* argument would be refuted entirely by it. The rabbis, however, maintain that the seven days in case of the Shekhina ARE written in the Bible, viz. [ibid., ibid.] : " Let her be shut up seven days." R. Tarphon, however, may say that that is the very verse which indicates the application of the rule of " It is sufficient," etc. And whence do the rabbis deduce the application of this rule ? There is another passage for that, viz. [ibid. 15] : " And Miriam was shut up." R. Tarphon, however, may say that that other verse is necessary to indicate that the rule of " It is sufficient," etc., is applicable in ordinary cases

also, as one might say that it is applicable to this case only because of the honor of Moses; hence the passage.

Let the "tooth" and "foot" be liable (if they do damage) on public ground by the following *a fortiori* argument: The horn (doing damage) on the premises of the plaintiff pays only half, still the same is the case even on public ground; the "tooth" and "foot," which pay the whole if on the premises of the plaintiff, is it not logical that they should be liable on public ground? Therefore the Scripture reads plainly [Ex. xxii. 4]: "And they feed in *another* man's field," which signifies private, but not public ground. Do we then say that the whole must be paid (as the tooth, to which this passage has reference), we say that one-half should be paid? There is another passage [Ex. xxi. 35]: "And divide *his* money," which signifies *his* money (of the horn), but not the money in other cases (*i.e.*, in other cases the whole must be paid).

Let the "tooth" and "foot" be liable only to one-half if on the premises of the plaintiff by the following *a fortiori* argument: The horn which is liable on public ground pays only half on the premises of the plaintiff; the "tooth" and "foot," which have no liability at all on public ground, should they not so much the more pay only half on the premises of the plaintiff? To this the Scripture reads [ibid. xxii. 4], "make restitution," which means a *satisfactory* payment (the whole).

Now let the horn on public ground not be liable at all by the following *a fortiori* argument: The "tooth" and "foot," which pay the whole on the premises of the plaintiff are not liable on public ground; the horn, which pays only half on the premises of the plaintiff, should it not so much the more be entirely free on public ground? Said R. Johanan: The Scripture added [ibid. xxi. 35]: "They shall divide" (which is superfluous, as it was already stated before that his money shall be divided), to signify that it is also liable on public ground.

Let a man (that kills another wilfully, but without warning, in which case he is neither to suffer the death penalty nor to be banished) pay a sum of money in atonement by the following *a fortiori* argument: An ox which is not liable to the payment of the four certain things (mentioned above, page 6) must nevertheless pay a sum of money in atonement; for a man who *is* liable to the payment of the above four things, is it not logical that he should be liable to the payment of a sum of money in atonement? To this the Scripture reads [ibid. 30], "whatever

may be laid upon *him*," which means upon *him only* (the ox), but not upon a man.

Now let the ox be liable to the payment of the four things by the following *a fortiori* argument: A man who is not liable to the payment of money in atonement is nevertheless liable to the payment of the four things; for an ox, which *is* liable to the payment of atonement money, is it not logical that he should pay the four things? To this the Scripture reads [Lev. xxiv. 19]: "And if a *man*, etc., in his neighbor," which does not mean an *ox*, etc.

The schoolmen propounded the following question: An ox that steps with his foot on a child lying on the premises of the plaintiff, what is the law in regard to the payment of the atonement money? Shall we say that it should be equal to the case of the horn, as when the horn gores twice or thrice it is considered its habit and pays atonement money, the same shall be applied to the foot, as it is always its habit to step? On the other hand, can it be said that there is no similarity to the horn because the horn gores with the intention to do damage, which cannot be said of a foot which steps without such intention? Come and hear: One who leads his ox into one's court without the owner's permission and the ox gore the owner to death, the ox is to be stoned and his owner, whether in case of viciousness or non-viciousness, must pay the full sum of atonement. Such is the dictum of R. Tarphon. Now let us see: Whence does R. Tarphon infer that in case of non-viciousness the full sum of atonement money must be paid? Is it not because he holds with R. Jose the Galilean, who says (Text, 486) that a non-vicious ox pays half atonement money on public ground, and he (R. Tarphon) draws an *a fortiori* conclusion from the "foot" (viz., the tooth and foot, which are not liable at all on public ground, pay the full amount of atonement money on premises belonging to the plaintiff, and the horn, which pays, according to R. Jose the Galilean, half atonement money on public ground, so much the more should be paid the full atonement money on premises belonging to the plaintiff). Hence we see that the case of atonement money applies also to the foot. Said R. A'ha of Diphthi to Rabhina: Common-sense also dictates so. For if one should think that it does not apply to the foot, and the Tana (R. Tarphon) deduces it only from the *injuries* caused by the foot (but not from the killing) (viz., if the foot, which on public ground is not liable for damages, pays the

full damage if on premises of the plaintiff, the horn, which pays on public ground half atonement money, according to R. Jose the Galilean, is it not logical that on premises belonging to the plaintiff it should pay the full sum of atonement money ?) It could be refuted and said: As far as the damage of the foot is concerned, it is its habit (to damage all things lying in its way when walking), but it is not so as to killing. Infer from this that the case of atonement money applies to the case of the foot also, and R. Tarphon has drawn his *a fortiori* conclusion from this case. And so it is.

MISHNA *VI.*: A human being is considered always vicious, whether he acts intentionally or unintentionally, when awake and also when asleep. If one blind the eye of his neighbor, or break his vessels, he pays the whole damage.

GEMARA: The Mishna teaches if one blind the eye of his neighbor that, as in the case of breaking one's vessels, only damage is paid for, but not the four things; so also in the former case only for the damage, but not the four things, is to be paid (when done unintentionally). Whence is that deduced (that the damage is paid for even when unintentionally) ? Said Hyzkiah, and so also was it taught by his disciples: The passage says [Ex. xxi. 25]. "wound for wound" (which is superfluous, for it is stated [Lev. xxiv. 19]: "And if a man cause a bodily defect"), to make one liable for unintentional as for intentional damage, and for an accidental as for a deliberate act. But do we not need this passage to make one liable for the pain (which is one of the four things explained above) where damages are paid ? If so, let the passage say "wound for wound," why then "wound *instead** of a wound" ? Infer from this both.

Rabba said: One who carries a stone in his lap without being aware of it, and while getting up from his seat drops it, as regards damages he is liable (for there is no difference whether it was intentional or not), but as regards the four things he is not; regarding the Sabbath the Scripture prohibits only intentional work; as to banishment (if a human being was killed thereby), he is not liable; as to his liability to a slave (if it fell on a slave and blinded him), R. Simeon b. Gamaliel and the rabbis differ (as to whether he must manumit him or not [Ex. xxi. 26]). If in the above case he was at first aware of the presence of the stone,

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* The literal translation of the text reads "a wound *instead* (ta'hath) a wound."

but subsequently forgot it, as to damages he is liable, as to the four things he is not (for the fact that he forgot it cannot be considered wilfulness); as to banishment he is liable, as regards Sabbath he is not; as regards a slave, R. Simeon b.Gamaliel and the rabbis differ. If he intended to throw the stone two (ells) distant and threw it four, as to damages he is liable; as to the four things he is not; as regards Sabbath, intention is necessary; as to banishment, the Scripture said [ibid. xxi. 13]: "And if he *did not lie in wait,*" excepting this case under discussion; as regards a slave, R. Simeon b. Gamaliel and the rabbis differ. If he intended to throw four (ells) and threw it eight (ells) distant, as to damages he is, as to the four things he is not liable; as regards Sabbath he is free unless he said: Let it fall wherever it may; as regards banishment the above-quoted passage means to except such a case as to his liability to a slave. R. Simeon b. Gamaliel and the rabbis also differ.*

Rabba said again of one who drops his own vessel from the top of a roof, and before it reaches the ground another person strikes it with his cane and breaks it, the latter person is not liable, for it is considered that he broke a broken vessel.

The same said again: One who drops a vessel from the top of a roof upon the ground which has been covered with pillows, and another person removes them before the dropping of the vessel (without the knowledge of the person who drops it) and the vessel was broken, there is no liability on the part of the person who drops it, for at the time he dropped it he thought it could not break, nor was the person who removed the pillows liable, because he was only the remote and not the proximate cause of the damage.

The same said again: If one drop a child from the top of a roof, and before it reaches the ground another person cut it with his sword, this is similar to the case of the following Boraitha, in which R. Jehudah b. Bathyra and the rabbis differ: If one was assaulted by ten different persons, no matter whether at once or at different times, and was killed, none of them has to suffer capital punishment, as according to the Scripture it must be known who was the cause of the death. R. Jehudah b.

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* In the last two cases there is only a difference as regards Sabbath. In the first case, even if he said, "Let it fall wherever it may," there is also no liability, for the Scripture requires that it should be intentional *work*, and in the first case the distance is so small that there can be no question as to his intention to do work.—Rashi.

Bathyra, however, holds, in case the assault was made by one after the other, that the last one is guilty, for he hastened his death (and this rule can be applied to the above case of the child).

If (in the case of the child) a vicious ox killed it with his horns before it reached the ground, this is similar to the case of the Boraitha (*post*, pages 90 and 91) in which R. Ishmael, the son of R. Johanan b. Broka, and the rabbis differ.

The same also said: One who falls from the top of a roof by an extraordinary wind and does damage, or falls on a woman and causes her shame, is liable for the damage, but not to the four things. If, however, it happen by an ordinary wind and causes damage or disgrace to a woman by falling on her, he is liable for all the four things except for the disgrace.

Lastly Rabba said: One who causes the death of another by placing live coals upon his (bare) breast has no liability (for the deceased could remove them); if he placed the coals upon another one's clothes and they were burned he is liable (because the moment the live coal was placed on the clothes the latter were at once damaged).

[Said Rabha: Both these cases are explained in Mishnayoth. The first one in Tract Sanhedrim, Mishna II., and the second in this tract, Chapter VIII., Mishna 5.] He, however, propounded the following question: If one placed a live coal upon the breast of his neighbor's slave, is the slave considered in such case as his own body (and there is no liability, for the slave should remove it), or is he considered only his property (and he is liable)? And if one should say that a slave is considered the body of his master, what is an ox under such circumstances considered? He subsequently solved it himself. A slave is considered one's body, and an ox is considered one's property (and there is liability in the latter case, for the ox cannot remove it).

CHAPTER III.

RULES CONCERNING PLACING VESSELS ON PUBLIC GROUND. INJURIES CAUSED BY PEDESTRIANS TO EACH OTHER WITH THEIR LOADS. THE VICIOUS AND NON-VICIOUS OXEN—IF THEY HAVE DONE INJURY TO EACH OTHER OR TO HUMAN BEINGS, ETC.

MISHNA *I.*: If one places a jug on a public ground and another person stumbles over it and breaks it, the latter is not liable; if he is injured, the owner of the barrel is liable for the damage.

GEMARA: The Mishna starts out with "jug" and ends with "barrel," and it is the same way in several subsequent Mishnas. Said R. Papa: Jug and barrel are one and the same thing (as to the cases cited). (If so) for what purpose did the Mishna change the terms? For business transactions (*e.g.*, if one sells barrels he may deliver jugs, and *vice versa*). How is the case? Shall we assume in the case of a certain locality where these terms are decidedly distinct, then jug is one thing and barrel another? It is only in the case where most of the people use those terms distinctly and separately, but there is also a small portion who use them interchangeably, in which case I would say that the majority is to be followed; hence the statement that in money matters the majority is not to be followed (but the burden of proof is on the plaintiff).

"*And another person,*" etc. Why is he not liable—must he then not look out? Said the disciples of Rabh in his name: The Mishna speaks of a case where he filled up the whole thoroughfare with barrels. Samuel said: When it is done in darkness. R. Johanan, however, said: The Mishna may be explained in that he placed the jug in a corner (where it could not be noticed). Said R. Papi: Our Mishna cannot be explained unless according to Samuel's or R. Johanan's interpretation, but not according to Rabh, because if it should be according to Rabh's interpretation he would not be liable if even he should break the barrel intentionally, as he had no passage way. (The Gemara, however, says that it can be explained also according

to Rabh's interpretation, as R. Zbid in the name of Rabha explains it further on.) Said R. Aba to R. Ashi: In the West it was said in the name of Ula that the reason for the statement of the Mishna is that pedestrians are not in the habit of looking around.

Such a case happened in Nahardea, and Samuel held him liable. In Pumbeditha—and Rabba held him liable. It is correct of Samuel, for he follows his theory; but Rabba, shall we assume that he concurs with Samuel? Said R. Papa: It was in a corner of an oil-mill (and it was customary with those who came to the mill to place their vessels outside when waiting for their turn to enter the mill), and because it was customary to place there the vessels the pedestrian had to take care not to break them. R. Hisda sent the following message to R. Na'hman: "It was said (it is the custom of the judges to fine) one who kicks the other with his knees three (selas); one who kicks the other with the foot, five; one who strikes the other with his fist, thirteen—what is the fine if one strikes his neighbor with the handle of a hoe or with the iron of the hoe?" He returned the following answer: "Hisda, Hisda, you are collecting fines in Babylon; state to me the facts in the case." He then sent him the following facts: There was a partnership water-basin out of which each of the partners irrigated his land every second day. Once one was irrigating his land from the basin when it was not his turn, and when the other one asked him why he did so and the former did not heed him, he struck him with the handle of the hoe. Said he (R. Na'hman) to him (R. Hisda): He would have been justified if he had even struck him a hundred blows, for even according to the one who holds that a man ought not to take the law into his own hands, in cases of loss one may do so, for when one is in the right he need not trouble himself (to go to court). And R. Na'hman says this, according to his theory which was taught elsewhere, that a man may take the law into his own hands even not in case of loss. According to R. Jehudah, however, this is permitted only in case of loss. R. Kahana objected: There is a Tosephtha: "Ben Bag Bag says: Do not enter the courtyard of thy neighbor secretly to take what belongs to you, for fear that he may look upon you as upon a thief, but do so publicly, and tell him that you take your own (in contradiction to R. Jehudah, who holds that one must not take the law into his own hands)." R. Jehudah rejoined: Your support, Ben Bag Bag, is an individual,

and the majority differ with him. R. Janai, however, explained that " take it publicly" means to do so with the *aid of the law.*

Come and hear: If an ox mount another to kill him, and the owner of the latter come along and pull out his own ox, and the former drop on the ground and is killed, he is not liable. Shall we not assume that this is in the case of a vicious ox, in which case there is no loss (for if he had not acted thus, and his ox should have been killed, he would have been paid in full; hence even where there is no loss one may take the law into his own hands)? Nay, it is in case of a non-vicious ox where there is loss (for if he should have waited to be paid by law, he would have received only one half). If so, how is the latter part of the Boraitha: " If, however, he pushed down the ox that mounted, and the ox was killed, he is liable." Now, if it is in case of a non-vicious ox, why should he be liable (there is loss, and he acted according to law)? Because he should have pulled out his own ox and not pushed the other so as to kill him.

Come and hear: " For one who obstructs the court of another by placing there jugs of wine and oil, the owner of the court may break the jugs while going in and out of the court." (Hence we see that one may do so although there is no loss?) Said R. Na'hman bar Itzhak: It means that he may break them while going out to go to court and also when coming in to get his documentary evidence (in case such is necessary; *e.g.*, when there is a dispute as to the ownership of the courtyard).

Come and hear the statement of our Mishna: "One who places a jug," etc., " he is not liable." The reason being that he stumbled over it, but if he broke it without stumbling over he *is* liable. (Hence we see that even when there is loss [for Rabh explained, above, this to be when the whole thoroughfare has been filled with jugs] no person is allowed to take the law into his own hand.) Said R. Zbid, in the name of Rabha: Nay, the same is the case even if he broke it intentionally, but the reason why he mentioned stumbling is because he had to state in the latter part that if he was injured the owner of the barrel is liable, in which case stumbling is essential, for if otherwise he himself caused his own injury; he mentioned that also in the first part.

Come and hear: " It is written [Deut. xxv. 12]: ' Then shalt thou cut off her hand'; this means that a fine of money shall be imposed upon her." May we not assume that this is only when she could not save herself otherwise? (Hence one may

take the law into his own hands ?) Nay, that means when she could do otherwise. Then how is the case when she could not—is she free ? If so, instead of the Boraitha stating in the latter part: It is written [ibid. 11]: "If she putteth forth *her* hand," this signifies to exclude the messenger of the court, if he has done a similar thing he is free (from paying for disgrace), let the Boraitha teach that there is a difference also in *her* own act; viz., the case is when she could save herself otherwise, but if she could not she is free? The Boraitha maintains thus: The case is when she could save herself otherwise, but if she could not, her hand is to be considered as a messenger of the court and she is free.

Come and hear: "One who set aside the due corner-tithe at one corner of his field and the poor came and took their due share at another corner, both are considered corner-tithe." Now if you should say that one may take the law into his own hands, let the owner prevent them from taking at another corner by force ? Said Rabha: The expression that "both are corner-tithe" means only that both are free from tithe (given to the Levites), as we have learned in the following Boraitha: "One who renounced his ownership to his vineyard and then hastened in the morning and plucked the fruit himself, he must observe *peret* [Lev. xix. 10], *gleanings* [Deut. xxiv. 21], *peah* [Lev. xix. 9], and *forgotten sheaves* [Deut. xxiv. 19], but he is free, however, from the Levites' tithe.

MISHNA *II.*: A jug (filled with water) that broke on public ground and its contents cause a person to slip and fall, or one is injured by its fragments, he (the carrier of the jug) is liable. R. Jehudah, however, says, if he break it intentionally he is, otherwise he is not.

GEMARA: Said R. Jehudah in the name of Rabh: It was taught only if he soil his clothes with the contents of the jug, but if he damage his person there is no liability, for the public ground (which has no particular owner) causes his damage. When I stated this before Samuel he said to me: Let us see; as to the liability for damage caused by one's stone, knife, or load (placed on public ground), we deduced it from the "pit" on public ground, as explained *post*, page 111 (in which the Scripture reads "ox" and "ass"), and in all of them I read "an *ox*, but not a human being"; "an *ass*, but not vessels," and only as far as death is concerned (as the Scripture in this case speaks of death); as to damage, however, if to person there is, but if to

property there is no liability on the part of the one who placed them there. (Hence Samuel's theory is the reverse of that of Rabh.) What has Rabh to say to this? This (that we deduce all that from "pit") is only where he had renounced his ownership from them (as such is the case with the pit on public ground), but if he had not it is still his property (and we deduce his liability from the "ox"). R. Oshyiah objected: (There is a Boraitha:) It is written [Ex. xxi. 33]: "And an ox or an ass fall therein," and we say an *ox*, but not a human being; an *ass*, but not vessels; and from this it was said that if an ox or an ass laden with vessels fell into the pit and they were broken, he is liable only for the injuries to the animal, but not for the damage to the vessels. Similar to this is his stone, knife, and load placed on public ground that cause damage. Therefore if one break his glass vessels by striking them against the stone so placed, he is liable. Now the first part of the Boraitha would be in contradiction to Rabh, who holds him liable for the vessels also, and the latter part (which treats of breaking glass vessels by striking them against the stone) would contradict Samuel? [Why would this be a contradiction only to those two? Do, then, those two parts of the Boraitha itself not contradict each other? Say, then, that Rabh would explain the Boraitha in accordance with his theory that he renounce ownership, and Samuel according to his theory stated above.]

Now, when we come to the conclusion that one's stone, knife, or load is equal to one's "pit," according to R. Jehudah, who holds that there is a liability for damages done to vessels by falling into a pit, if one strike his bottle against a stone he is liable. Said R. Elazar: Thou shouldst not think that he is liable only when both the stumbling and the breaking were caused by the stone, and not if only the breaking was caused by the stone, as in reality he is liable even in such case, as we concur with R. Nathan's theory (which is explained on page 120).

"*If intentionally*," etc. What means intentionally? Said Rabba, when he intended to lower them down from his shoulders (and while doing so they struck against the wall, he is liable, for his carelessness is considered a deliberate act). Said Abayi to him: Should we infer from this that R. Meir (who is very rigorous) holds that one is liable even if the jug dissolve of itself (although it is an accident)? He answered: Yea, R. Meir holds one liable if even only the handle remained in his hand. Why so? Is this not an accident, and being such, the Scripture frees

him from liability, as it is written [Deut. xxii. 26]: "But unto the damsel shalt thou not do anything"? And if you should say that this is only as regards capital punishment, but as regards damages one is liable, have we not learned in a Boraitha: "If his jug break and he fail to remove the fragments, or if his camel fall and he fail to raise it, R. Meir holds him liable for the damage they cause; the sages, however, hold that he is free from human justice and is liable only to heavenly justice; and the sages concede to R. Meir, where one places his stone, knife, or load on the top of a roof, and they are blown down by an ordinary wind and do damage, that he is liable; on the other hand, R. Meir concedes to the rabbis that, where one places jugs on the roof in order that they should dry, and they are blown down by an extraordinary wind and do damage, he is free" (because it is an accident; hence even according to R. Meir damages by an accidental act are excusable)? Therefore said Abayi: They differ (in our Mishna) in two cases: during the falling and after the vessels rested upon the ground; one holds that for stumbling while falling he is liable for carelessness, and the other one holds that it is an accident. And they also differ after the resting of the vessels, in case he renounce his ownership to the articles which caused the damage; one holds him liable even in such a case, and the other one holds him free. And wherefrom is such a theory? From the fact that the Mishna mentions two cases, viz.: "If he slipped on account of the water, *or* he was injured by the fragments," which is practically one and the same thing, we must say then that it means either when he slipped on account of the water while falling or that he stumbled over the fragments after they rested. But how is it with the above Boraitha, can you apply also to it the same interpretation? This would be correct regarding the jug containing water, but how can we find the above two cases in regard to the camel, as you cannot hold one liable for the stumbling of his animal, even in a case where one is held liable for his own stumbling; and if there should be a liability it should be only in one case, namely, if he renounced his ownership to the carcass? Said R. A'ha: It can be explained that the camel stumbled by reason of the overflow of a river. How is the case? If there was another way, then he is surely liable; if there was no other way, is it not accident? Therefore it must be explained thus: that he himself stumble first and the camel stumble over him, in which case his stumbling is considered

carelessness. But (according to R. Jehudah, who requires intention in our Mishna in case one renounce ownership from his articles which caused damage) what intention can there be so that he should be held liable ? Said R. Joseph, and so also said R. Ashi: If his intention was that he should regain ownership of the fragments. R. Elazar also holds that they differ even during the falling and concurs with Abayi's theory stated above.

R. Johanan, however, said that they differ only as to after they rested, and he comes to teach us that only in this particular case the rabbis freed him from liability if he renounced his ownership to the articles which caused the damage because it was accidental (but where there is no accident he is liable for renouncing his ownership).

It was taught: "One who renounces ownership to his articles that cause damage, R. Johanan and R. Elazar: one holds him liable and the other holds him free." Shall we assume that the one who holds him liable is in accordance with R. Meir and the other one is in accordance with the rabbis ? Nay, as to R. Meir, all agree (that he is liable); they only differ as to the rabbis: the one who holds him free concurs with the rabbis, while the one who holds him liable may say: I say that even the rabbis who held him free do so only in the case of an accident, as stated above, but in other cases they also held him liable. There is ground for the supposition that it is R. Elazar who holds one liable. (See Pesachim, page 8, line 22, "Two things," etc.) Have we not heard from him concerning the following Mishna (above, page 30, end): "One who stirs up manure," etc., that it is so only in case he had an intention to claim it as his own, but otherwise he is not; hence we see that Elazar holds that if one renounce ownership to his articles which caused damage he is exempt. Said R. Adda bar Ahba: The case here is that he restored it to its original position. Said Rabbina: The case as explained by R. Adda bar Ahba is similar to one who finds an uncovered pit and he covers it and then again removes the cover (in which case he is not liable, for it is considered as if he never had anything to do with it). Said Mar Zutra, the son of R. Mari, to Rabbina: I fail to see any similarity. In the case of the pit the former act (the uncovered pit) is still as it was, while in the case of manure the act of the first one is no more in existence (because the place it first occupied is now vacant). If it has any similarity to a pit it is in case one find

an uncovered pit and stuff it up, and then again dig it out, in which case the former act disappears entirely and is wholly his work (and therefore he is liable). Therefore said R. Ashi that the case of manure was that he stirred it up less than three spans (and therefore it is considered no stirring up at all [because of *Lavud;* see Sabbath, page 12], and whereas he had no intention of exercising any act of ownership, it cannot be considered his property, and if we cannot hold him liable as being his property, we can also not hold him liable for digging a pit). And why does R. Elazar force himself to explain it where he stirred it up below three, and the reason is only because he intended it as an act of claiming ownership, but not otherwise; let him explain it that it was above three, and although there was no intention of claiming ownership he is nevertheless liable? (Because he holds that one who renounces ownership to the articles which cause damage is liable.) Said Rabha: He did so because of the phraseology of the Mishna, viz.; Why "stirred" up—why not "lifted" up? Hence that "stirring" means below three spans.

Now when we come to the conclusion that it is R. Elazar who holds him liable, then it is R. Johanan who holds him free. Does then R. Johanan really hold so? Did he not say elsewhere that the Halakha prevails as an anonymous Mishna, and there is such a Mishna: "One who digs a pit on public ground and an ox or an ass falls into it and is killed, he is liable"? We must, therefore, say that R. Johanan holds that he is liable. Now, on the other hand, if R. Johanan holds that he is liable, then R. Elazar holds that he is not; but has not R. Elazar said in the name of R. Ishmael (Pesachim, page 8, "Two Things," etc., hence, that he holds that he is liable? These present no difficulty. What is stated here is his own, and that in Pesachim is his teacher's opinion.

MISHNA *III.*: One who empties water into public ground and causes injuries thereby, he is liable for the injuries. One who hides away a thorn or glass, or one who builds his fence of thorns, or a fence that falls in into public ground and some persons were injured thereby, he is liable for the damage.

GEMARA: Said Rabh: It was taught only if his vessels were soiled, etc. (see page 60). Said R. Huna to Rabh: If this should be considered even his mud (he ought to be liable)? Rejoined Rabh: Do you understand that the water was not absorbed? I mean when it *was* absorbed, and yet he injured him-

self by the collected earth, and therefore there is no liability, for he should have been careful.

[Why did Rabh repeat his statement here ? He said that already in connection with the preceding Mishna.] This was necessary: Once as to the sunny season and once as to the rainy season, and it is in accordance with the following Boraitha: "Although it is permitted during the rainy season to empty refuse-pipes and clean excavations, still it is not permitted to do so during the sunny season; and even in the rainy season, although they do it with permission, they are liable for the damage they cause."

"*One who hides away,*" etc. Said R. Johanan: It was taught only in case it is jutting out, but if it is pressed in he is free. Why is he not liable even when it is pressed in ? Said R. A'ha, the son of R. Ika: For the reason that it is not the custom of man to rub against the wall. The rabbis taught: One who hides away his thorns or glass in the wall of his neighbor, and the owner of the wall comes along and pulls down the wall and the thorns or glass falls into the public ground and does damage, the one who hid them away is responsible. Said R. Johanan: This is the case where the wall was in bad condition, but where the wall was in good condition the owner of the wall only is liable. Said Rabhina: It is to be inferred from this that if one covers his well with the pail of another, and the owner of the latter comes along and carries away his pail, the former is liable (if some accident occurs). Is this not self-evident ? Lest one say that because the owner of the wall did not know who hid the thorns and could not inform him to remove them, therefore he is free; but in case of the well, as the owner of the pail knows him, he should have informed him that he took away the pail, and therefore the owner of the well should be free—he comes to teach us that there is no difference.

The rabbis taught: The former pious men used to bury their thorns and broken glass in their fields three spans below the surface in order that they should not interfere with the plough. R. Shesheth used to burn them. Rabha used to throw them into the (river) Chiddekel. Said R. Jehudah: One who wishes to be pious should observe the laws of damages. Rabhina said: He should observe the teachings of the fathers (which were enumerated in the first tract of this section).

MISHNA *IV.*: One who places straw or hay on public ground in order to convert them into manure, and some pedes-

trian sustains injury through them, he is liable; and the one who takes possession of them first is entitled to them. R. Simeon b. Gamaliel says: All those who obstruct a public thoroughfare by placing chattels therein and cause damage are liable; and the one who takes possession of them first is entitled to them. One who stirs up manure on public ground and a pedestrian sustains injury thereby is liable.

GEMARA: Shall we assume that our Mishna is not according to R. Jehudah of the following Boraitha: "R. Jehudah says: During the season of conveying manure one may remove his manure to the public highway and collect it there for thirty days in order that it should be trodden by man and animal, for on this condition did Joshua distribute the land"? It can be explained that R. Jehudah concedes that nevertheless he is liable for the damage.

(There is an objection.) Come and hear: "All those of whom it was said that they may obstruct the public highway, if they do damage they are liable; according to R. Jehudah, however, they are not." Said R. Na'hman: Our Mishna treats of the season when the manure is not conveyed, and it is according to R. Jehudah. R. Ashi, however, says: Our Mishna states "straw" and "hay" (which means before they were converted into manure, and the reason is) because they are slippery.

"*The one who takes possession of them,*" etc. Rabh said: This applies to both the original substance as well as to its improvement. Zëira, however, holds that it applies to the improvement only. What is the point of their difference? Rabh holds that the original substance is also to be confiscated (as a fine) because of the improvement, and Zëira holds that only the improvement is to be confiscated. There is an objection from the clause of our Mishna: "One who stirs up manure," etc., and does not mention that the one who takes possession of it first is entitled to it. (Hence it contradicts Rabh.) Said R. Na'hman bar Itzhak: You quote a contradiction (to Rabh) from the subject of manure. In cases where there can be an improvement (*e.g.*, straw) the original substance was also subjected to the rule as a fine, but where there can be no improvement (*e.g.*, manure) there is no fine at all.

The Schoolmen propounded a question: According to the one who holds that the original substance is to be fined because of the improvement, is it to be fined at once or only after the improvement has taken place? This can be inferred from the fact

that it was attempted to contradict Rabh from "manure" (which does not improve; hence that he is to be fined at once). What answer is this? Did not the Schoolmen propound their question after they heard of R. Na'hman's answer, and nevertheless they were doubtful? Shall we assume that in this case the Tanaim of the following Boraitha differ? "One who removes his straw and hay to a public highway to convert it into manure, and a pedestrian sustains injuries, he is liable, and the one who takes possession of them first acquires title to them, and if one takes them it is considered robbery. Rabban Simeon b. Gamaliel, however, holds that all those who obstruct a public highway and cause damage thereby are liable to pay the damage, and the one who lays his hand upon the articles of obstruction first acquires title to them, and it is not considered robbery." Let us see. How is this Boraitha to be understood? It reads that the one who lays his hand on the articles of obstruction first acquires title to them, and immediately thereafter it states that the one who takes them is guilty of robbery. It must, therefore, be explained thus: "One who lays," etc., acquires title to the improvement, but the original substance is prohibited as robbery, and R. Simeon b. Gamaliel, however, says the same is the case also with the original substance. According to Zëira surely the Tanaim differ in this case, but according to Rabh do they also differ? Rabh may say that all agree that the fine applies to the original substance on account of the improvement, but in what they differ here is, whether this Halakha should be put into practice or not. As it was taught: "R. Huna said in the name of Rabh: The Halakha is so, but it is not applied in actual practice. R. Adda bar Ahbah, however, holds that it is applied in practice." But this is not so, for R. Huna once declared peeled baley (placed by one on public ground to dry it) ownerless, R. Adda bar Ahbah did the same with date-husk. It was correct for R. Adda bar Ahbah, as he followed his theory (stated above), but shall we assume that R. Huna retracted from his statement above? Nay, in this case the owners were warned (several times).

MISHNA *V.*: Two potters (each carrying pottery) that walked, one following the other, and the first stumbled and fell, and the second stumbled over the first and also fell, the first one is liable for the damages of the second.

GEMARA: Said R. Johanan: It is not to be said that our Mishna is only according to R. Meir, who holds that stumbling

is considered wilful and therefore he is liable, but even according to the Rabbis who hold that it is an accident and he is free. Here, however, the case is different, for he had to get up (at once) and he had not done so. R. Na'hman bar Itzhak, however, holds that if he even could not get up he is liable, because he had at least to give warning to the other, which he had not done. R. Johanan, however, denies this theory, for if he could not get up he could also not give warning (because of his excitement).

There is an objection from the following Mishna: "If one carrying a barrel followed one carrying a beam, and the barrel was broken by the beam, he is free, but if it broke because the carriers of the beam stopped, he *is* liable." Is it not to be assumed that he stopped in order to place the beam on the other shoulder, which is usually done, and still it is said that he is liable, because he should give warning? Nay, he stopped to rest. But how is it in the former case, is he free? Then the Boraitha should state that it is only when he stopped to rest, but if to place it on the other shoulder he is free. Why then does it state in the latter part that he is free only if he told him to stop with the barrel? With this he comes to teach us that, although he stopped to rest, if he called to him to stop he is free.

Come and hear: "Potters and glaziers that walked, one following the other, and the first one stumbled and fell, and the second one stumbled over him and the third over the second one, then the first is liable for the damage of the second and the second is responsible to the third. If, however, they all fell on account of the first one, he is responsible for the damage of all; but if they warned each other they are not responsible." Is this not so even if they could not get up? Nay, they could get up, and it comes to teach us that even in such a case when they warned each other they are free.

Said Rabha (in explanation of the above Boraitha): "The first one is liable to the second one for both injuries to the person and to property. The second, however, is liable to the third one for personal injuries only." [How is this to be understood?] If stumbling is considered a wilful act, let the second one also be liable; if, on the other hand, stumbling is considered an accident, then let the first one also be free. The first one is considered wilful as it is equal to a "pit on public ground," in which case the digger is liable for both injuries to the person

and to property; the second, however, who is considered as if he himself has fallen into the pit (because of the stumbling of the first) can be liable only for personal injuries because he did not get up in time, but not for damages to property, as he can say that he did not dig the pit.

The Master said: If they all fell because of the first one, the first is liable for the damage of all of them. How was the case? R. Papa said: He obstructed the way (crosswise) like a carcass (which obstructs the whole way). R. Zbid, however, said: If such should be the case the first one would not be liable for the damages of the third, who should be careful, seeing that the second one stumbled over the obstruction of the whole thoroughfare; therefore he maintains that the first one fell diagonally and did not obstruct the whole thoroughfare, and the third one in his intention to walk on the unobstructed portion of the thoroughfare did not see the stumbling of the second and stumbled over him.*

MISHNA *VI.*: If one was coming from one side of the street carrying a barrel, and the other one was coming from the other side carrying a beam, and the barrel was broken by the beam, there is no liability, as both had the right to go each his way (and the carrier of the barrel should be careful not to collide with the beam). The same is the case when the carrier of the barrel followed the carrier of the beam. If, however, the carrier of the beam stopped (without any reason), and the carrier of the barrel while walking broke it by striking against the beam, he is liable; if the carrier of the barrel was told to stop by the carrier of the beam he is free. If the carrier of the barrel was preceding, and the carrier of the beam was behind him and broke his barrel by colliding with the beam (although unintentionally), he is liable (because of carelessness); if the barrel carrier stopped, he is free; but if he told him to stop and the beam carrier did not heed him, he is liable. The same is the case with one carrying fire and the other hemp.

GEMARA: Rabba bar Nathan questioned R. Huna: When one injures his wife by having intercourse with her, how is the law: is he free because he has done it with permission, or is he

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* The text reads, "as the cane of a blind one," and Rashi explains it, that when feeling the way with his cane, the blind man places it wherever it happens, longwise or crosswise. The above explanation, however, which is more lucid, is according to Tosphath.

nevertheless liable because he had to look out for her health? And he answered: This we have learned in our Mishna: "He is free, as both had the right to go each his way." Said Rabha to the latter: Is there not to be drawn an *a fortiori* conclusion from a wood [Deut. xix. 5] in which case both had permission to enter, and nevertheless when one was injured or killed, it is considered that the defendant entered the plaintiff's premises, and he is responsible or guilty; so much the more here it must be considered that he entered upon her premises and injured her? [But did not the Mishna state that each of them had permission to go his way? There is no similarity. In the case of the Mishna both had equal permission, and each of them did the same thing the other did, but here only he acted but she did nothing. Is that so? Did not the Scripture say plainly [Lev. xviii. 29]: "Even the souls that *commit* them shall be cut off"? Hence we see that the Scripture considers the female also as acting. There both of them derive pleasure and therefore are punished, but here the act is only his.] Resh Lakish said: If there were two cows on public ground, one of which was lying and the other one walking, and the latter kicked the former, she is not liable; if, however, the reverse was the case she is liable. (This was explained above, page 50.)

MISHNA *VII.*: Two that were on public ground, one running and the other one walking (ordinarily), or both of them running, and they injured each other, both are free.

GEMARA: Our Mishna is not according to Issi b. Jehudah of the following Boraitha: "Issi b. Jehudah says: The one who was running is liable, for it is uncommon. He, however, concedes that if it was on the eve of Sabbath in twilight, that he is *not* liable, for he is permitted at that time to run (and therefore it is considered common)." Said R. Johanan: So the Halakha prevails. But has not R. Johanan said elsewhere that the Halakha prevails according to an anonymous Mishna, and our Mishna (which is anonymous) states not so? The case in our Mishna is to be explained in that it speaks of the twilight on the eve of Sabbath, from the fact that it states, "or they were both running they are free." Then without the above explanation it would be superfluous after the statement that if even only one was running, etc., for it is self-evident that if both were running that so much the more they ought to be free; therefore the Mishna must be considered as incomplete, and should read thus: If one was running and the other one was walking, there is no

liability, when the case was in the twilight of the eve of Sabbath ; on a week day, however, the one running is liable; if both were running they are free, even on a week day.

The Master said: "And Issi concedes that if it was in the twilight of the eve of Sabbath he is free, for he did so with permission." What is the permission ? It is according to R. Hanina, who used to say: Come with us to meet the bridal queen. And according to others, "to meet the Sabbath bridal queen." R. Janai used to get up, enwrap himself and say: Come bride, come bride! (Hence it is a merit to run at twilight on the eve of Sabbath to meet the Sabbath.)

MISHNA *VIII.*: One who chopped wood on public ground and caused damage on private ground, or *vice versa;* or on his own private ground, and has done damage on another's private ground, he is in either of those cases liable.

GEMARA: And all the three cases were necessary to be mentioned, for if the Mishna should state the case of one who chopped wood on his own private ground, and did damage on public ground only, one might say that the liability is because on a public thoroughfare there are usually many passers-by; but if *vice versa* there is no liability because on private premises there are not many people. And if it should state the case of public to private ground only, one might say that the liability is because he had no right to chop wood there, and as he did that without permission he is liable, but from private to public ground, where he had a right to do so, there is no liability even if it caused damage on public ground. And if it should state these two cases only, still one might say that in one case he is liable, for he has done it without permission, and in the other case because there are many persons, but from one private ground to another, where usually not many people are, and each owner is permitted to do such a thing on his own premises, there is no liability, therefore it was necessary to mention all. The rabbis taught: "One who enters a carpenter's shop without permission, and was struck on his face by a flying splinter and died, there is no liability. But if he entered with permission the carpenter is guilty." Guilty of what ? Said R. Jose b. Hanina: It means the liability to pay the four certain things, but he is free from banishment, for it is not equal to the case of a forest, which is considered the ground of every one who enters it, but in this case he entered his neighbor's estate. Said Rabha: Is not the following *a fortiori* conclusion to be drawn here: A

forest, where each one enters by his own will (without the permission of the other), still it is considered as if he entered by the request of the other, and he is to be banished (in case he kills one unintentionally) ; in the case at bar, where he decidedly enters by the request of the other, shall he not so much the more be banished ? Therefore we must explain the Boraitha thus: He is free from banishment means that this alone would not be sufficient, and the reason of R. Jose b. Hanina is that it is such an act of negligence that almost amounts to an intentional act (for he should look out).

An objection was raised from the following: "One who throws a stone into a public ground and kills some one, he is to be banished." Is *this* not such a negligent act as almost amounts to an intentional act, for he had to have in mind that on public ground people come and go, and still it says that he must be banished. Said R. Samuel bar Itzhak. The case is that he was tearing down his wall and threw the material into rubbish in the daytime. What was the nature of this rubbish ? Was it such rubbish as people are likely to be about, then it is intentional ? If not, then is it an accident ? Said R. Papa: The case is that it was rubbish that people do their necessities thereon in the night-time, but not in the daytime, but still it may happen that some might do so in the daytime; it cannot be considered an intentional act, for it is uncommon to do so in the daytime, and, on the other hand, it is also not an accident, for it may happen.

R. Papa in the name of Rabha explained that R. Jose b. Hanina's statement has reference to the first part only, viz.: "One who enters a carpenter's shop without permission, and was struck in the face by a flying splinter and died, the carpenter is free." Said R. Jose b. Hanina: He is liable to pay the four things, but he is free from banishment (and the difference is thus): That he who explains that it refers to the latter part of the above Boraitha, so much the more as to the first part; but according to R. Papa, he who explains that it refers only to the first part, in the latter part where he entered by request he is to be banished. Is that so ? Have we not learned in the following Boraitha: "One who enters a blacksmith's shop and was struck by an escaping spark and died, there is no liability, even if he entered with permission" ? The case here is that it was the blacksmith's apprentice. Assuming that it is so, may he be killed ? It was that his employer insisted that he

should leave the shop, and he did not do so. Supposing it so, may he be killed? The employer thought that he did leave. If so, then any person would come under the same rule. In the former case the apprentice usually obeys his employer (and therefore the blacksmith assumed that he left when being told to do so), but in the case of a stranger the blacksmith should look around and see whether the stranger did leave or not.

R. Zbid in the name of Rabha supported the above statement by the expression of the verse, viz. [Deut. xix. 5]: "It (the iron) found,"* but not when he *makes* himself found to the iron. From this R. Eliezer b. Jacob said: One who drops out of his hand a stone, and another one puts out his head and is injured by it, he is free. Said R. Jose b. Hanina: He is not to be banished, but he must pay the four things.

He who applies the explanation of R. Jose to the last case self-evidently holds that it also applies to the former case, and he who applies the explanation to the former case, in the last case may say that he is wholly free.

The Rabbis taught: Employees who came to demand their wages from their employer, and were gored by his ox or bitten by his dog, to death, he is free. Anonymous teachers, however, hold that employees have the right to demand their wages from their employer (and therefore he is guilty). How is the case? If the employer usually comes to town, what reason have the anonymous teachers for their assertion? If, on the other hand, he can be found only in the house, what is the reason of the first Tana? It is in a case where he is not certain, and the employe when knocking on the door or gate is told "In"; one holds that "in" means "come in" (and therefore they had the right to enter), and the other one holds that "in" means "stay where you are (and I will come out to you)." There is a support to the latter construction of "in" from the following Boraitha: "An employee that entered to demand his wages from his employer, and he was gored by his ox or was bitten by his dog, he is not guilty although he entered with permission." Why so? We must say that it means that when knocking on the door or gate he was told "in," and he meant that he had permission to enter, but in reality "in" meant only "stay where you are (and I will come out to you)."

MISHNA *IX.*: Two non-vicious oxen that wounded each

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* The Hebrew term [Deutr. xix. 5] being ומצא, literally "it found."

other: the one who is hurt the most is to be paid one-half of the amount of the value of difference of the injuries. If both are vicious the *full* amount of difference of the injuries is to be paid. If one is non-vicious and the other vicious: if the vicious one injured the non-vicious more than he himself was injured he pays the full amount of the difference, if the reverse is the case only one-half is paid. So also if two men wound each other, the one who hurt the most must pay the full amount of the difference.

A man who hurt a vicious ox and was also hurt by the ox, or when the reverse was the case, the full amount of difference is to be paid. If the case was with a non-vicious ox the man pays the full amount and the ox pays the half. R. Aqiba, however, says: Even if the ox was non-vicious, the full amount is to be paid.

GEMARA: The rabbis taught: It is written [Ex. xxi. 31]: "According to this judgment shall be done unto him." That means that as the judgment when two oxen gore each other, so also shall it be when an ox gores a man. As in the former case a non-vicious ox pays one-half and a vicious one the full amount; the same is the case if it gored a human being. R. Aqiba, however, says: "According to *this* judgment" means that the judgment just mentioned applies to man, but not to the preceding case. Shall we assume that it must be paid from the best estates? Therefore it is written [ibid., ibid.]: "Shall be done unto *him*," which means that he pays only from the body of the ox, but not from the best estates.

MISHNA *X.*: An ox of the value of one hundred selas that gored another one of the value of two hundred, and the carcass was worthless, the plaintiff takes the ox (*i.e.*, one-half of the damage).

GEMARA: Our Mishna is in accordance with R. Aqiba of the following Boraitha (which treats of the same case, and teaches): "The ox shall be appraised in court, and if he is worth one-half of the killed one the plaintiff may take him." Such is the dictum of R. Ishmael; R. Aqiba, however, holds that the plaintiff takes the ox without any appraisement. On what point do they differ? R. Ishmael holds that the plaintiff becomes a creditor, and his demand is money, and it must be assessed by the court, and R. Aqiba holds that the plaintiff becomes a partner to the defendant, and they differ as to the explanation of the following passage [Ex. xxi. 35]: "Then they shall sell the live ox and divide his money, and the dead ox also

they shall divide." R. Ishmael explains that it means that this shall be done by the court, and R. Aqiba maintains that the passage makes the parties partners, if both oxen were of equal value; if, however, the goring ox was worth half he belongs at once to the plaintiff. What is still the difference? When the plaintiff has consecrated him (according to R. Aqiba he is sacred, and according to R. Ishmael he is not until awarded to the plaintiff by the court). Rabha questioned R. Na'hman: If the defendant sold the ox, how is it, according to R. Ishmael, who holds him to be a creditor, is the sale valid? Or perhaps because the ox becomes subject to the appraisement of the court it is not valid? He answered: The sale is not valid. But have we not learned in a Boraitha that it *is* valid? He may recover him. If it is so, what is the validity of the sale? In case the vendee used him in the meantime in ploughing he need not pay for it. Then infer from this that if a borrower sells his personal property the Beth Din can recover it for the benefit of the lender. Nay, from this case in which the Scripture made the ox hypothecary nothing can be inferred.

R. Ta'hlipha, of Palestine, taught in the presence of R. Abuhu: If he sold him it is invalid, but if he consecrated him it is valid. Who sold him? The defendant, and all agree that the sale is not valid, because even according to R. Ishmael he is still subject to the appraisement in court, and if he consecrated him all agree that he is sacred, because even according to R. Aqiba, who holds that he belongs to the plaintiff without any appraisement, a sacred thing is different by reason of the statement of R. Abuhu, who said that it was so decreed for fear that it might be said that consecrated things become ordinary without being redeemed.

The rabbis taught: "A non-vicious ox that has done damage, if he was sold, consecrated, slaughtered, or presented to somebody, the act is valid if it was done before the rendition of judgment; if, however, either of these things were done after rendition of judgment, it is null and void. If the creditors levied upon the ox, whether the damage was done before or after the recognition of the court of the debt the levy is void, for the damages in case of a non-vicious *ox* are paid from his body only. In case of a vicious ox all the above acts of his owner are valid without regard whether it was done before or after rendition of judgment, and even the levy of creditors is valid regardless of whether the damage was done before or after

recognition, for the reason that damages in case of a vicious ox are paid from the best estates only.

The Master said: "If sold it is valid, as far as the non-payment for the ploughing he has done; if it was consecrated it is valid for the reason stated by R. Abuhu; and if slaughtered or presented to somebody the act is valid." It would be correct as to presenting, because it means as far as the value of ploughing is concerned, but in case he was slaughtered, why should not the damage be collected from the value of his meat? Have we not learned in a Boraitha: "It is written: 'The *live*.'" Whence do we know that if even it was slaughtered? Therefore it is written: "And they shall sell the ox," which means in whatever state he is? Said R. Shizbi: This (that the act is valid) was necessary only as to the reduction in value on account of being slaughtered (*i.e.*, the owner of the ox need not pay the amount of such reduction).

The rabbis taught: "An ox of the value of two hundred zuz that gored another ox of the same value, and injured him to the extent of fifty, and the injured ox then improved and became of the value of four hundred, although it is possible that if not for the injury he would have improved still more, and would have become of the value of eight hundred, still he pays him only as at the time of the injury (one-half of fifty zuz); if, however, the injured ox became lean and decreased in value, he pays him according to the value at the time of the trial. If the ox who caused the injury improved, he pays him as at the time of the injury; if he decreased in value, as at the time of the trial. On account of what was that leanness of the plaintiff's ox? If it was on account of work done with him by the plaintiff, let the defendant say, Why should I suffer for the decrease in value caused by you? Said R. Ashi: The case is that the leanness was caused by the blow, in which case the plaintiff can say the horn of your ox is still impressed (in my ox) and this caused leanness.

MISHNA *XI.*: An ox of the value of two hundred that gored another ox of equal value and the carcass was of no value whatever. R. Meir holds that of such a case it is written [Ex. xxi. 35]: "Then shall they sell the live ox and divide his money." Said R. Jehudah to him: So the Halakha prevails in reference to the passage cited by you, but how is the last part of this passage [ibid., ibid.]: "And the dead one shall they also divide"? This can apply to a case where the carcass of the ox

(which ox was of the same value as the goring ox) is still worth fifty Zuz, in which case each takes one-half of the live and one-half of the dead ox.

GEMARA: The rabbis taught: "An ox of the value of two hundred zuz that gored an ox of equal value and the carcass was worth fifty, each one takes one-half of the live and one-half of the dead ox, and this is the case of the ox intended by the Scripture." Such is the dictum of R. Jehudah. R. Meir, however, holds this is not the ox intended by the Scripture, but it is where it is as stated in the beginning of the Mishna, and the provision of the passage that "also the dead ox shall they divide" is carried out by appraising how much the carcass is worth less than when the ox was alive, and one-half of that difference (seventy-five zuz) is paid to the plaintiff from the live ox together with the carcass. If it is so, then, according to both, if the carcass is worth fifty each of them gets one hundred and twenty-five, as even according to R. Jehudah, who divides both oxen between them, the share is only one hundred and twenty-five, what is the difference between them? Said R. Johanan: The difference is as to the increase in value of the carcass (since the time of the injury). R. Meir holds that it belongs wholly to the plaintiff, and R. Jehudah holds that they are considered partners, and each takes one-half. And this was because there presented itself a difficulty to R. Jehudah: If you say that the Scripture sympathized with the defendant and meant that he should share in the improvement (of the carcass), would you say in case of an ox worth five selas (twenty zuz) that gored an ox worth one hundred and the carcass is worth fifty zuz, that they also must divide equally the live and the dead ox (and so the defendant will still profit in that, because the one-half carcass is worth twenty-five zuz, and half of the live is worth ten zuz, which makes thirty-five zuz, while the value of the defendant's ox was only twenty zuz), and where do we find such a case wherein the defendant should still profit? And furthermore, is it not written plainly [ibid. 36]: "He shall surely pay," which signifies that the defendant *pays*, but should not profit. [For what purpose is this additional passage adduced? Lest one say that he pays only where the plaintiff does actually suffer damages, but where he does not, as, for instance, an ox worth five selas that gored an ox of equal value, and the carcass was worth six selas (by increase in price, in which case the plaintiff profits), in such a case the defendant may profit, therefore this

passage is adduced to show that the defendant should always pay but never profit.] Said R. A'ha bar Ta'hlipha to Rabh: If it is so, then according to R. Jehudah, who insists upon the division of both, we find instances according to him that a non-vicious ox pays more than one-half, and the Scripture provides expressly [ibid. 35]: "Then shall they sell the live ox and divide his money" (*e.g.*, when an ox worth fifty gored one worth forty, and the carcass was worth twenty, then the damage amounts to twenty, and if the plaintiff take one-half of the live ox which is twenty-five, and one-half of the carcass which is ten, he would receive altogether thirty-five, which is more than one-half of the damage). Nay, R. Jehudah also holds of the rule that the difference should be divided and deducted from the live one. Whence does he deduce it? From [ibid., ibid.]: "And the dead ox also they shall divide." But does not R. Jehudah deduce from this passage that each takes one-half of the dead and one-half of the live one? The passage could read: "And the dead ox they shall divide." Why "and the dead ox *also*"? To infer both.

MISHNA *XII.*: There are cases when one is liable for the acts of his ox and is free if they are his own acts, and *vice versa.* How so? If one's ox cause disgrace the owner is free,* but if he himself did so he is liable. If his ox blinded the eye of his slave or knocked out his teeth the owner is not liable (*i.e.*, the slave is not to be manumitted), but if he himself did it he is. If his ox wounded one of his parents he is liable, but if he himself had done so he is free; and the same is the case when his ox set fire to a barn on Sabbath he is liable, while if he himself did so he is free, for in both last cases he is guilty of a capital crime.

GEMARA: R. Abbuhu taught in the presence of R. Johanan: All those whose acts are of a destructive nature are not liable (as regards the observation of the Sabbath), except those who wound and set fire. Said R. Johanan to him: Go and teach this outside of the college (*i.e.*, such a statement is not to be respected by the college), as those two mentioned are no exceptions (and are also of destructive nature); they can only constitute exceptions in case of the wounding (of an animal when he needed the blood) for his dog,† and in case of fire when he needed

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* As explained above, p. 53, from the verse Levit. xxiv. 19.

† According to the commentary of R. Hananel.

the ashes (*i.e.*, when the act was done with an intention to derive benefit from the things acted upon).

There is an objection from our Mishna: "An ox that set fire to a barn," etc. And as the Mishna equals the owner to his ox, is it not to assume that as the ox had no need of the fire so also had the owner none, and still it is stated that he is free (civilly) because he is guilty of a capital crime (hence we see that setting fire on Sabbath is an exception)? Nay, the equality is in the reverse; that is, as the owner did it with some purpose, so also did the ox. How is this possible of an ox? Said R. Avia: It may be explained that it was an intelligent ox that had an itch on his back, and he started the fire in order to roll in the ashes. But whence do we know that this was his intention? From the fact that he really did roll in the ashes. Are there such intelligent oxen? Yea, there are, as there was an ox that belonged to R. Papa, who when he once suffered from toothache removed the cover from the beer barrel and drank from the beer to be cured.

Said the rabbis to R. Papa: How can you say that the equality is that the ox imitated the owner? Does not the Mishna state that if his ox cause disgrace he is free, but not if he himself: now can an ox have such intelligence as to intend to disgrace? Yea, for instance, when he intended to do damage (but caused only disgrace), in which case the Master said elsewhere, if he intended to do damage but caused only disgrace, he is liable.

MISHNA *XIII.*: An ox that ran after another ox, and the latter was injured, the plaintiff claims that the ox injured him while the defendant claims that it was not so, but that the injury was caused by rubbing against a stone: the rule is that the burden of proof is upon the plaintiff. If two oxen having different owners were running after a third, each of the defendants claiming that the other one's ox caused the injury, both of them are free; if the two oxen belonged to one person both are liable (as explained further on); if one ox was a big one and the other a small one, the plaintiff claims that the big one caused the injury while the defendant claims that the small one caused it (the difference being that the big one is of sufficient value to pay the half damage while the small one is not); or if one was non-vicious and the other vicious, the plaintiff claiming that the vicious one did the injury, and the defendant claiming that the non-vicious did it, the burden of proof is upon the

plaintiff. If the defendant's oxen were two, one a big one and the other a small one, and so also were the plaintiff's oxen, the plaintiff claims that the big one injured his big ox and the small one injured the small ox, and the defendant claims that the reverse was the case (so as to reduce his payments); or when one was a non-vicious and the other one a vicious one, the plaintiff claims that the vicious one injured the big one and the non-vicious the small one, while the defendant claims that it was not so, but that the non-vicious injured the big one and the vicious the small one, the burden of proof is upon the plaintiff.

GEMARA: Said R. Hyya bar Abba: This statement (in the Mishna, that the plaintiff has the burden of proof) shows that Summachus' companions differ with him, for Summachus holds (*post*, page 106) that money, the ownership of which is doubtful, must be divided among its claimants. Said R. Abba bar Mamel to R. Hyya bar Abba: Does then Summachus hold so even if both of them claim to be positive in their statements? He answered: Yea. And whence do we know that our Mishna also speaks that both claim to be positive in their statements? Because it teaches plainly: One party says: *Your* ox; and the other party says (positively): *Not so.* R. Papa opposed: According to your explanation that both claim to be positive in their statements, the last part must naturally also treat of such a case; then how is it to be understood: If one was a big one and one was a small one, etc., the plaintiff has the burden of proof; how would be the law if he does not prove: he takes according to the statement of the defendant? Would this not be in contradiction to Rabba bar Nathan, who says that where one party claims to have sold another party wheat, and the other party admits to have bought of him barley, that the latter is free (and according to the above rule the seller would be entitled to recover for barley)? We must, therefore, say that the case is when one claims that he is positive, while the other one is not positive. Let us see who claims that he is positive. Shall we assume that the plaintiff claims that he is positive and the defendant does not, then there will still be a contradiction to Rabba bar Nathan. We must, therefore, say that the plaintiff does not claim that he is positive while the defendant does so (and therefore he claims his damages from both, and if he does not prove his assertion he recovers only according to the defendant's statement). Now as the latter part speaks of a case where the plaintiff was uncertain and the defendant was certain, the

same must be the case in the first part of the Mishna, and even Summachus holds to his theory, because if not it was not necessary for the Mishna to teach this case. Nay, in the latter part of the Mishna the plaintiff is not positive and the defendant is positive, and in the first part the reverse is the case.

But after this explanation the first part and last part treat of different cases; then could you not explain that the first part speaks where both were positive (and only then Summachus says that the money should be divided), and the last part treats where one is positive and the other is not (in which case Summachus does not oppose). It can be said: Certainty and uncertainty in the first part, and uncertainty and certainty in the other part is still one and the same case, but if both assert certainty in one case and certainty and uncertainty in the other case, there are two different things, and if the Mishna should mean so it would state so plainly.

"*Both are liable.*" Said Rabha, of Pharsika, to R. Ashi: Infer from this that if non-vicious oxen cause damage the plaintiff may collect his damages from any one of them. Nay, the case in the Mishna is that both oxen were vicious. Said R. A'ha the elder to R. Ashi: If the case were that they were vicious, why is it stated that *both* are liable? It ought to be "*he*" (the man) is liable, meaning the owner (as the damage is paid from the best estates). We must, therefore, say that the case is that they were non-vicious, and it is according to R. Aqiba, who holds that they (the parties) are considered partners, and the reason here is that both oxen are on hand, in which case he cannot shift the responsibility upon the missing ox, but where one of them is missing the defendant may say to the plaintiff: Prove that *this* ox has done the injury, and I will pay you.

CHAPTER IV.

RULES IN REGARD TO OXEN REPEATEDLY GORING OTHER OXEN AND HUMAN BEINGS. OXEN OF ORPHANS AND GUARDIANS AND WHAT IS CONSIDERED "GUARDED."

MISHNA *I.*: An ox that gores four or five oxen one after another, the last of them must be paid from the body of the goring ox (if he was yet considered non-vicious., *e.g.*, when the goring was not in succession*), and from the balance of the half body the last but one must be paid, and if there was still a balance left the last but two must be paid, so that the later the more privileged. Such is the dictum of R. Meir. R. Simeon, however, says that if an ox of the value of two hundred zuz gores an ox of the same value, and the carcass is worth nothing, each one takes one hundred; if he again gores another of the value of two hundred, the last one takes one hundred zuz, and the former takes fifty, and fifty zuz remain for the owner of the goring ox; if he again gores a third one of the same value, the last one takes one hundred, the last but one takes fifty zuz, and the first as well as the owner takes each a golden dinar (twenty-five silver dinars).

GEMARA: According to whom is our Mishna? It is certainly not according to R. Ishmael, who holds that the plaintiffs are considered creditors, for if it be so, then not the last, but the first would be more privileged, for he was prior to the last one in point of time. Neither can it be in accordance with R. Aqiba, who holds that in case of a non-vicious ox the plaintiff and the defendant are considered copartners, for then if there is a balance left from the body of the ox after the goring of the last one, the same would have to be divided equally among *all* the plaintiffs previous to the last one, and the decree of the Mishna is that the last but one must be paid, etc. Said Rabha:

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* Rashi explains this as follows: After the first goring he saw another ox and did not gore and after the second goring he saw two or three other oxen and did not gore them, and so after the third and fourth gorings in which case he is not considered vicious even in alternate order, as explained further on in the text.

The Mishna can be explained in accordance with R. Ishmael, and the difficulty that it is stated that *the later*, the more privileged, which ought to be *the first* (according to R. Ishmael), is to be explained thus: that the plaintiff levied upon the ox, and in such a case the plaintiff becomes responsible for the damage done by the ox while under his control, as he is then considered a bailee for hire as regards damages (and so was the case with all others). But if such was the case, then why is it stated that if there is a balance left it goes to the last but one? It ought to go to the owner of the ox (for all the gorings subsequent to the first one were made while the ox was not under his control). Said Rabhina: The statement in question means that if after the last one was paid from the body of the ox, there still remained a balance, the same must be paid over to the preceding one.* And so when Rabhin came from Palestine he said in the name of R. Johanan that the Mishna is to be explained in the same sense that Rabha did; that is, that the Mishna treats only about the negligence of the plaintiffs who took the ox under their control and neglected to sufficiently guard him as was their duty to do.

Now, when the Mishna is explained to be in accordance with R. Ishmael, how is it about the last part: "R. Simeon said, etc., . . . the first as well as the owner take each a golden dinar"? This is certainly in accordance with R. Aqiba's opinion that the goring ox becomes the common property of a copartnership. Then the Mishna would be in accordance with

* This is very complicated, and the commentaries differ as to the explanation and illustration thereof. Rashi maintains that if the value of the fifth one was only fifty zuz, the carcass being of no value, he collects from the body of the goring ox his full half of twenty-five zuz, and turns over the balance to the fourth one, whose ox was of the value of one hundred zuz, who collects nevertheless only twenty-five zuz, for the reason that the twenty-five zuz collected by the fifth one are deducted from his half damage, because the ox was then under his control, and the balance is turned over to the third one, applying the same rule; one full half value of the ox, however, belongs to the owner, as the ox was not under his control since the first goring. Hananel's illustration of this rule, however, is in reverse order: The first one whose ox was of the same value of the goring ox, who had to collect one hundred zuz out of the body of the goring ox, loses fifty if the goring ox gores another of the value of one hundred while under his control, and so the second pays to the third the one half of the damage done to him, so that only the last one takes his full half damage, as the ox was not under his control. Tosphath remarks that in such cases it can happen that the third and fourth should collect nothing, and even the fifth one may not be able to collect his full half. See the objection of Samuel Eidlis (Marsha) to these remarks of Tosphath and the answer of Sabbati Kohen in his commentary on the Schulchan Aruch, §401, and their illustrations.

two different opinions, viz., the first part according to R. Ishmael and the last part in accordance with R. Aqiba. The Schoolmen said: Yea, so it is, for Samuel said to R. Jehudah (concerning this Mishna): " Genius, leave alone the explanation of the Mishna and agree with me that the first part is according to R. Ishmael and the last part according to R. Aqiba." *

MISHNA *II.*: An ox that is vicious towards his own species, but not towards other species, or towards human beings but not towards animals, or towards young cattle, but not towards full-grown cattle, the whole damage is to be paid to those towards which he is vicious and half to those towards which he is not vicious. The disciples asked R. Jehudah what the law was when an ox was vicious on Sabbath days, but was non-vicious on week days. He answered: The same is the case also here. He pays the whole for damage done on the Sabbath days, and half for that done on week days. When is such an ox restored to non-viciousness? If he refrained from doing damage for three Sabbath days in succession.

GEMARA: It was taught: R. Zbid said: The Mishna teaches " *and not vicious*," which means that as to other species it was certain that he was not vicious, but if it is not certain he is to be considered vicious towards all. R. Papa, however, said: The Mishna teaches " he *is* not vicious," which means that an ox that is vicious towards his species is not considered vicious towards others. The reason for their difference of opinion is the following: The former lays more stress on the last part of the Mishna, which teaches that when he is vicious towards young cattle he is not considered vicious towards full-grown cattle, and this could be correct only in accordance with his interpretation that it is *certain* that he was not vicious, but according to the explanation that he is considered non-vicious this statement is entirely superfluous, as it was already stated that he is not considered vicious even to young cattle if it is not certain, and it is self-evident that so much the less towards full-grown cattle. The latter attaches more importance to the first part of the Mishna, which teaches that if vicious towards human beings he is not considered so towards cattle, and this could be correct only if it is explained that if it is uncertain that he is vicious to cattle he is also considered non-vicious; then the

* Here is an omission which will be supplied in the eighth chapter of this tract, as there is the proper place for it.

statement of the Mishna is necessary to teach us that, although he is vicious towards human beings, he is still not considered so towards cattle, but if you should explain that he is considered vicious, even when it is uncertain, then this statement is entirely superfluous, as it was already stated that he is considered vicious even from cattle to cattle, and it is self-evident that so much the more so when he is vicious toward human beings.

Said R. Ashi: The last part of the Mishna could support R. Zbid only. Come and hear: "The disciples questioned R. Jehudah what the law was, etc., . . . and he answered, etc. . . ." Now, if the Mishna is to be explained according to R. Zbid, that when not certain he is considered vicious, both the question and the answer are correct (*i.e.*, they questioned him, when he was certain for Sabbath days and not certain for week days, how was the law); but if you will explain the Mishna otherwise (*i.e.*, as R. Papa) what was their question? The Mishna states plainly that he is not vicious. Did they intend to teach R. Jehudah and not to question him? And, secondly, was it then an answer of the latter? He only repeated what they said? Said R. Janai: R. Zbid's opinion is supported even from the first part of the Mishna, which states: "The whole is paid to those toward whom he is vicious, and half is paid to those toward whom he is not." This statement can be correct only when he is certain to be non-vicious; then it is correct that the Mishna explains its former statement: To those toward whom he is vicious he must pay so much, and to those, etc., but if the Mishna means to state that one vicious toward human beings *is not* vicious toward cattle, to what purpose is the latter statement? Is it, then, not known how much a vicious ox and how much a non-vicious pays? If, however, an ox gored another ox, an ass, and a camel, he must be considered vicious toward all species of cattle even according to the theory of R. Papa (as these three species make it certain that he is vicious).

The Rabbis taught: There is a case where an ox may become vicious "in alternate order," namely, if he meets an ox and gores him, and subsequently he meets another ox and does not, the third however he meets he again gores, when meeting the fourth one, though, he does not, but when meeting the fifth one he does; and again the sixth he does not. There is another case where an ox may become vicious "in alternate order" towards all species, namely, if he meets an ox and gores him, and subse-

quently an ass and does not, a horse and does, a camel and does not, a mule and does, a wild-ass and does not gore him.

The Schoolmen propounded a question: How is it if he gores three oxen in succession and subsequently one ass and one camel: shall we count the third ox together with the former two, and should he be considered vicious toward oxen only but not toward other species of cattle, or shall we count the last ox with the ass and camel, so that he gored three times in succession three different species of cattle, and he is then considered vicious toward all species of cattle? This question remains unanswered.*

Rabha said: "If an ox gored three times, each time upon hearing the blowing of a horn, he is considered vicious when hearing the sound of a horn." Is this not self-evident? Lest one assume that the first time is not to be counted because he became frightened, he comes to teach us that it is counted.

MISHNA *III.*: An ox belonging to an Israelite that gored an ox belonging to the sanctuary, or of the sanctuary that gored one of a commoner, there is no liability, for it is written [Ex. xxi. 31]: "The ox of *another*" (man), but not of sanctuary.†

GEMARA: This Mishna is not in accordance with R. Simeon b. Menassia of the following Boraitha: "An ox of a commoner that gored an ox of the sanctuary, or *vice versa*, is free, for it is written: 'The ox of *another*,' but not of the sanctuary. R. Simeon b. Menassia, however, says that an ox of the sanctuary that gored an ox of a commoner is free, but an ox of a commoner that gored an ox of the sanctuary, whether vicious or not, the whole damage must be paid." Let us see what the reason is of R. Simeon's opinion. If R. Simeon interpreted the word "*another man*" literally, why, then, should the commoner's ox be liable when he gores an ox of the sanctuary (the sanctuary cannot be called another man)? And if he interpreted the word not literally, why should an ox of the sanctuary be free when he gored a commoner's ox? And if one might say that although he interpreted the word literally, he nevertheless makes the

* Here follow several similar questions, all remaining unanswered, and they are of no importance.

† For the first time in our translation we omit here a statement of the Mishna regarding the goring of an ox belonging to an idolater, for it seems to us that it was inserted here not by the editors of the Mishna; the evidence for this we have set forth in a long article in Hebrew in the monthly "Ner Hamarabi." We will probably explain this to our English readers in an appendix to the "third gate" of this section.

commoner pay on the ground of the following *a fortiori* conclusion: When one commoner's ox gores a similar ox he must pay; so much the more if a commoner's ox gores one belonging to the sanctuary, and then his statement that even if he was non-vicious the whole damage must be paid would not be correct, as there is a rule that it is sufficient that an inference should be equal to the law from which it is derived (and under no circumstances more rigorous); why then must he pay the whole damage if it is based only on this *a fortiori* conclusion? Said Resh Lakish: In reality in all cases the whole damage must be paid; the verse, however, making an exception of goring and stating that half only is to be paid, added at the same time the word רעהו (which means, literally, "his comrade"), with the intention to exclude all those cases where it cannot be considered of his comrade, *e.g.*, of the sanctuary; and the correctness of this statement may be proved from the fact that when the verse speaks of a vicious ox the above word "Re-ehu" is not mentioned.

When the daughter of R. Samuel bar Jehudah died, one of the Rabbis said to Ula: Let us go and console him. He said to them: What have I to do with the consolation of a Babylonian, for it may turn into a blasphemy, as they are in the habit of saying in such cases, "What can be done?" (against the will of God), which means that if something could be done against His will they would, and this is certainly a blasphemy. He then went alone, and his consolation was as follows: It is written [Deut. ii. 9]: "And the Lord said unto me, Do not attack the Moabites, nor contend with them in battle." Could it, then, ever enter Moses' mind to engage in war without the consent of the Lord? But Moses drew an *a fortiori* conclusion for himself, thus: If of the Midianites who only came to help the Moabites the Scripture reads [Numb. xxv. 17]: "Attack the Midianites, and smite them," the Moabites themselves so much the more? The Holy One, blessed be He, then said: "Thy conclusion was so because thou couldst not imagine what I bear in my mind. Two good doves I have to bring forth from them; namely, Ruth the Moabite and Naomi the Amonite." Now is there not an *a fortiori* conclusion to be drawn? If for two good doves the Holy One, blessed be He, has saved two great nations and has not destroyed them, so much the more would He have saved the life of the master's daughter if she would be righteous and something good would have to come forth from her.

MISHNA *IV.*: An ox of a sound person that gored an ox belonging to a deaf mute, idiot, or minor, there is a liability. If the reverse was the case, there is none. An ox of the three last-named persons that gores, the court should appoint a guardian and the witnesses should testify in the presence of the guardian. If in the meantime the deaf mute is cured, the idiot becomes of sound mind, or the minor becomes of age, the ox is restored to his non-viciousness. Such is the dictum of R. Meir. R. Jose, however, says that he remains in the same position. An ox of the stadium (*i.e.*, the place where oxen are trained for fighting) is not liable to be killed when killing even a human being, for it is written: "If an ox *gore*," which means of his own inclination, but not when he is trained to do so.

GEMARA: Does, then, the Mishna not contradict itself? First it states that if an ox of the three named persons that gores an ox of a sound person, there is no liability, from which it may be inferred that no guardian is to be appointed when the ox is non-vicious to enable the plaintiffs to collect from his body, and immediately after it states that an ox of those three persons that gores, the court should appoint a guardian and witnesses should testify before him, from which it may be inferred that a guardian is appointed for the purpose of enabling to collect from his body? Says Rabha: This is to be interpreted thus: If they were known to be goring oxen the court appoints a guardian, and the witnesses are examined in the presence of the guardian and the ox is declared vicious, so that if he subsequently gores again the damage is collected from the best estates. From whose best estates? R. Johanan said: From those of the orphans.* R. Jose b. Hanina said: From those of the guardian.

Did R. Johanan, indeed, say so? Did not R. Jehudah say in the name of R. Assi that the estate of orphans must not be touched (until the orphans reach majority, even when there is a written obligation of their deceased father to be paid), unless interest would grow on the obligation (*e.g.*, when the deceased borrowed money from a Gentile). R. Johanan, however, says also when the widow's marriage contract is to be paid, because she must be paid out of the estate a sum of money for her subsistence so long as her marriage contract remains uncollected. Hence we see that only for the purpose of supporting the widow, or where there is interest growing, R. Johanan permits to collect

* *I.e.*, those three named in the Mishna.

from orphans' estates, but not otherwise. Reverse the statement in our case, that R. Johanan holds from the estate of the guardian, and R. Jose b. Hanina said from those of the orphans. Said Rabha: Because there is a contradiction between the statements in the name of R. Johanan, you make R. Jose err. R. Jose b. Hanina was a judge, and he always dived to the bottom of the law. Therefore the statement in our case is not to be reversed, but the reason why R. Johanan states in our case that it shall be collected from the estates of the orphans, is because there is no other way, as if it should be collected from the estates of the guardian nobody would consent to become one. And the reason for Jose b. Hanina's statement that it shall be collected from the guardian's estates is because the guardian will be able to collect what he has paid from the orphans' estates when they reach majority.

There is a difference of opinion of the Tanaim as to whether a guardian is appointed in order to collect from the body of the ox in the following Boraitha: "An ox who has gored and his owner subsequently became a deaf mute, an idiot, or went to the sea countries, Jehudah b. Nekussa in the name of Summachus holds that he must be considered non-vicious until the evidence of viciousness was given in the presence of his owner; the sages, however, hold that a guardian is appointed and the evidence is given in his presence. Should it happen that the deaf mute became cured, the idiot of sound mind, or the owner has returned home, Jehudah b. Nekussa in the name of Summachus says that the ox is restored to his non-viciousness, and remains so until the evidence is given in presence of the owner, and R. Jose says that he remains in the same position he was in." Now let us see what Summachus does mean by his first statement that he must be considered non-vicious, etc. Shall we assume that the ox was still non-vicious; *i.e.*, he had not gored thrice? Then how shall his second statement be explained, that he is *restored* to his non-viciousness, which means that he was already vicious? We must then say that the statement that he is considered non-vicious means that it is considered that he had not gored at all, hence no guardian is to be appointed to collect from his body, and the sages say that there is one appointed. This is the explanation of the first part of the above Boraitha. In the last part of the Boraitha they differ on another point; that is, if the change of control also changes his state (*i.e.*, whether the change from the control of the guardian to

that of the owners changes also his viciousness to non-viciousness)? Summachus holds that it does, and R. Jose holds that it does not.

The rabbis taught: "An ox of a deaf mute, idiot, or minor that gored, according to R. Jacob, the half damages must be paid." How was the case? If it was a non-vicious ox it is self-evident that only half is to be paid, as the same is the case with an ox of a sound man, and if R. Jacob means that only half is paid even if he was vicious, let us see under what circumstances it may be said so. If the necessary care was taken of him then even the half should not be paid (for it is plainly written [Ex. xxi. 29], "and he hath *not* kept him in," but here in this case he had kept him in), and if the necessary care was not taken of him why should not the whole damage be paid (as according to R. Jacob there is no difference who owns the ox)? Said Rabha: This can be explained that it was a vicious ox, and care was taken of him, but not so much as was necessary to prevent him from coming into contact with other oxen; and the reason of R. Jacob's opinion is because he holds in accordance with R. Jehudah, who says that the state of non-viciousness continues until he is declared vicious, and he also agrees with him in that imperfect care is sufficient also for a vicious one, and he agrees also with the Rabbis that a guardian is to be appointed to collect from the body of the ox. Said Abayi to Rabha: But do not R. Jacob and R. Jehudah differ from each other in their opinions? Have we not learned in the following Boraitha that the ox in question R. Jehudah holds him liable, and R. Jacob holds that he must pay half? Said Rabbah b. Ula: R. Jacob only explains the liability to which R. Jehudah holds him, but does not differ with him. Rabhina, however, says that they do differ, but the case was that there was a change of control; that is, that the deaf mute was cured, etc. R. Jehudah holds that he remains in the same position he was in (and therefore he pays the whole), and R. Jacob says that the change of control changes also his status.

The rabbis taught: "Guardians pay from the best estates, but do not pay the atonement money" (see Ex. xxi. 30). Who is the Tana who holds that the money (which is to be paid according to the verse mentioned) is in atonement, and orphans need not have atonement, for they are not of age? Said R. Hisda: It is R. Ishmael, the son of R. Johanan b. Broka, of the following Boraitha: "It is written [ibid., ibid., ibid.]: 'And he

shall give the ransom of his life'; that is, the value of the deceased. R. Ishmael, the son of R. Johanan b. Broka, however, says it means the value of the defendant." Shall we not assume that the point of difference is, that the Rabbis hold that the beginning of that verse means the value of the deceased in money as damages, but not in atonement, and R. Ishmael holds that it is in atonement? Said R. Papa: Nay, all agree that it is in atonement, but their point of difference is: The Rabbis hold that the appraisement must be of the person who was killed (because his value is to be paid), and R. Ishmael holds that the appraisement must be of the person of the defendant, because it is written [ibid.]: "And he shall pay the ransom of *his* life." And the Rabbis? Yea, it is true that it states "*his* life," which means that his life is atoned for, but the amount to be paid for such atonement is the value of the deceased.

Rabha once declared before R. Na'hman that R. A'ha b. Jacob was a great man, and R. Na'hman said to him: When he comes to visit you bring him to me. When he had done so, said R. Na'hman to R. A'ha: Question something of me; and he put him the following question: "An ox belonging to two copartners (who has killed a man), how shall the atonement money be paid? If each copartner should pay the full amount then there would be two atonements, and the verse reads one; and if we should say that each of them shall give only half, then each pays only *half*, while the verse states that 'there shall be laid on *him* a sum of money,' which means the whole sum, and not the half." While R. Na'hman was sitting and deliberating over the case, he put to him another question, as to whether the property of the one who has to pay atonement is levied upon, as such is the case with one who owes sin and trespass-offerings (this will be explained in Tract Eruchin). And R. Na'hman said to him: Leave alone this question. I am still sorrowful that I could not answer the first question at once.

The rabbis taught: "One who borrows an ox with the understanding that he was non-vicious, and it was found out that he was vicious (and while being under the control of the borrower he gored again), the owner pays one-half and the borrower the other half. When, however, he became vicious while being under the control of the borrower, and he has returned him to the owner (and he gored once more), the owner must pay half and the borrower is free." Let us see: The Master said that in case he was borrowed with the understanding of

being non-vicious, and was found vicious, each pays one-half. Why shall the borrower pay anything? Let him say to the owner, I have borrowed an ox, but not a lion. Said Rabh: The case was that it was known to the borrower that he was a goring ox. But still, he can say that he was understood to be non-vicious, and he turned out to be vicious, why shall I pay half? Because the owner may answer him: What difference does it make to you in this case, if even he would be non-vicious? As soon as he has gored while being under your control you would have to pay half; the same is now, you pay only half. But still there is a difference, for a non-vicious ox pays from his body, while a vicious one from the best estates. The owner may say: Even in this case there is no difference to you, for you would have to pay for the other half of the ox to me in money. Now let us see (the second part of the Boraitha): "When he became vicious while under the control of the borrower, etc., the borrower is free;" hence we see that the change of control changes his status, and from the first part it is to be inferred that it does not change the status, as the whole damage is to be paid if he gored while under the control of the borrower. Said R. Johanan: Break* this Boraitha: the Tana who taught the first part did not teach the last one. Rabba, however, says: The Boraitha cannot be broken, as in the first part it is declared that change of control does not change the status, the same must be the case with the second part. The reason, however, for its decision is because the owner can say as regards the viciousness of the ox, which occurred while under the control of the borrower: The latter did not take care of him as he was not his, and therefore I do not consider him vicious at all. R. Papa, however, says: As in the last part of the Boraitha the control does change the status, so also is it in the first part, but the reason why there the whole amount is to be paid is because the ox always bears the name of his owner, even while under the control of the borrower, and therefore the change of control is not to be considered.

"*The ox of the stadium*," etc. The Schoolmen propounded a question: Is the ox in question fit for the altar or not? Rabh said he is, for he was goring by compulsion, and Samuel said he is not, for at any rate a transgression was committed with him. There is a Boraitha supporting Rabh, which states

* This form of expression is often used in the Talmud.

plainly that the ox of a stadium is not guilty of death, and is fit for the altar.

MISHNA *V.*: An ox that killed a man by goring him, if it was a vicious one, the atonement money is to be paid, but not when he was a non-vicious one. Both of them, however, must be killed. The same is the case when he gored a minor male or female. If he gored a male or a female slave he must pay thirty selas, without regard whether their value was one thousand zuz or only one dinar.

GEMARA: If a non-vicious ox killing a man must be killed, how can there be found a vicious ox in regard to man? Said Rabba: The case was that he was running after three men, two of whom escaped, and the court determined from the circumstances that if he would have caught those two he would have killed them. R. Ashi, however, holds that such determination is of no value, but the case was that he gored two, injuring but not killing them at once, and then gored a third one to death, when the first two also died, and therefore he is considered vicious as to the third to pay the atonement money. R. Zbid, however, says: By "vicious one" is meant simply that he has killed three animals, and an ox that is considered vicious as to animals is considered so also as to human beings.*

"*Both of them,*" etc. The rabbis taught: "From [Ex. xxi. 28]: 'Then shall the ox be surely stoned'; is it not self-evident that he became a carcass, and a carcass must not be eaten, why then does the verse add 'and his flesh shall not be eaten'?" The verse comes to teach that if he was slaughtered after judgment was rendered the flesh must not be eaten. This is the prohibition of eating it, but whence is it deduced that no benefit must be derived from it? Therefore it is written [ibid., ibid.]: "But the owner of the ox shall be quit," which means he shall be quit from any benefit. Such is the explanation of Simeon b. Zoma. But whence do we know that the words, "his flesh shall not be eaten," mean when he was slaughtered after judgment was rendered; perhaps it means after he was stoned, and the words "shall not be eaten" are to be explained that he shall not derive any benefit, but if he was slaughtered the flesh may be eaten also? The prohibition to eat it is inferred from

* In the Gemara this last sentence is put as a question, and there are many answers to it which we deem of no importance to be translated. The law, however, prevails as we have translated in our text.

"surely stoned," and if the verse "his flesh shall not be eaten" would mean to prohibit any benefit, it should have stated "shall not be derived any benefit," or "he shall not be eaten." Why the addition "his flesh" to indicate that if he was turned by slaughtering into food, as other meat, it is also prohibited?

The rabbis taught: It is written [ibid. 28]: "But the owner of the ox shall be quit." Said R. Eliezer: He is quit from paying the half of atonement money. (One might say as a non-vicious pays half damage in case of goring an animal, the same is the case when he first gores a man.) Said R. Aqiba to him: Is this not self-evident? The half payment is collected from his body, and here when the ox is stoned its owner may certainly say: "Bring it into court and collect from it." Said R. Eliezer to him: Do you consider me as common as not to know such a case? I speak of an ox that is not guilty of death; for instance, if he killed a man in the presence of one witness, or in the presence of his owner only (in which case the ox cannot be killed, but one might say that nevertheless the half atonement money must be paid). [You say in the presence of his owner, which means that the owner admits that it was so, then it would be equal to one who confesses of being liable to pay a fine, and the law is that he who confesses of being liable to fine is free? R. Eliezer holds that this money is in atonement and not a fine.]

In another Boraitha we have learned: Said R. Eliezer: "Aqiba, do you consider me so common as to speak of an ox which is to be killed? I speak about an ox who intended to kill an animal but killed a human being, or who intended to kill a non-viable child and killed a viable one." Which of these two statements has R. Eliezer made to R. Aqiba first? R. Kahana in the name of Rabha said the one just mentioned was made first. R. Tibiumi in the name of the same authority said that the first statement was made first. The statement of the former is to be compared to a fisher who catches fishes in the sea; if he finds big fish he takes them, and if afterward he finds small ones he takes them also (although the second statement is much straighter evidence than the first one, he nevertheless made also the other statement), and R. Tibiumi's statement is to be compared to a fisher who keeps the small fish if he catch them first, but catching afterward big fish he abandons the small ones and keeps the big ones. (So was the case with R. Eliezer. He tried to give him evidence from the first statement, but as this

was easily objectionable he tried to find stronger evidence and gave it to him.)

We have learned in another Boraitha: "But the owner of the ox shall be quit." R. Jose the Galilean said that means that he is quit from paying the value of *children* (if she was pregnant). Said R. Aqiba to him (Is it necessary to have a separate verse for this)? Is it not written [Ex. xxi. 22]: "If men strike, and hurt a woman with child," etc., from which is to be inferred that only in case of human beings there is a liability for hurting children, but not in case of oxen? (Says the Gemara): Is not R. Aqiba correct? Said R. Ula, the son of R. Idi: Another verse is necessary for the following reason: From the verse just mentioned one might say men, but not oxen that are equal to men. That means, as men are considered always vicious, so vicious oxen are free from liability for hurting children, but non-vicious oxen should be liable. Therefore comes the other verse, "The owner of the ox shall be quit," to teach that even in such a case there is no liability. Said Rabha: Shall the native remain on earth and the stranger be lifted up to the highest heaven?* (*i.e.*, how can it enter the mind that a vicious ox shall be free and a non-vicious shall be liable?) Therefore said R. Ada b. A'hba: (This verse alone would not be sufficient, for) in case of men they are liable for the children only when they intended to strike each other and struck the woman, but if they intended to strike the woman herself there is no money liability because they are guilty of a capital crime; but in case of oxen one might say that even when they intended to strike the woman herself their owner shall be punished also to pay for the children, therefore the expression "shall be quit" indicates that it is not so. And so was it taught plainly in a Boraitha which R. Hagi brought when he came from the south, as R. Ada b. A'hba explained it.

We learned in still another Boraitha: R. Aqiba said: "But the owner of the ox shall be quit," means from the payment for a slave (in case he was killed by the ox). But why should not R. Aqiba say to himself, as he said above to R. Eliezer, page 143: "Bring it into court and collect from it," as the ox must be stoned? Said Rabha: The verse is nevertheless needed for the following reason: One might say: Because there is more rigorousness about a bondman than about a freeman, as for a bondman thirty shekels are paid even if he was worth only one

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* See explanation of this expression in Tract Erubin, p. 16, footnote.

shekel, and in case of a freeman his actual value only is paid, therefore it might be said that the payment for the bondman must be from the best estates; hence the verse to make him quit.

There is a Boraitha in support of Rabha, as follows: "The owner of the ox shall be quit." Said R. Aqiba: Quit from payment for the bondman: but why is a verse needed for that, is it not common sense? He is liable for a bondman and is liable for a freeman: as in the liability for a freeman you made a distinction between a non-vicious ox and a vicious one, is it not common sense that there shall also be made the same distinction in the liability for a bondman. And in addition to that we may draw the following *a fortiori* conclusion: A freeman for whom there is a liability for his full value, and nevertheless there is a distinction between a vicious and non-vicious ox, a bondman for whom only thirty selas are paid (although he may have been worth one hundred or more), so much the more that there ought to be a distinction between a vicious and non-vicious one (why, then, is the verse needed)? There is more rigorousness about a bondman than about a freeman, for in case of the latter, if he was worth one sela he pays that much—that is, only the actual value—but in case of a bondman thirty selas are paid if even he was worth one sela, and therefore one might say that whether vicious or non-vicious the full amount must be paid, hence the verse that he shall be quit.

The rabbis taught: It is written [ibid., ibid. 29]: "And he killeth a man or a woman." Said R. Aqiba: What does the verse mean to teach us by the expression "a man or a woman," if it is only to teach that a woman is equal to a man? This was already stated in the preceding verse: "If an ox gore a man or a woman." This verse is to make a woman equal to a man in this respect, that as the damages for the killed man must be paid to his heirs, so also in the case of a woman it is paid to her heirs. But does R. Aqiba hold that her husband does not inherit from her? Have we not learned in the following Boraitha: "It is written [Numb. xxvii. 11]: 'And he shall inherit it'? From this is to be inferred that the husband inherits from his wife." So said R. Aqiba. Said Resh Lakish: R. Aqiba meant the atonement money, which payment is made only after her death, and thus it is only considered inchoate and the husband does not inherit such a share in her inchoate as he does in her existing estates. But what is the reason that it is collected only after

her death ? Perhaps it is to be collected as soon as the court came to the conviction that she must die from the injuries. Therefore it reads [ibid., ibid. 29, 30]: " And he killeth a man or a woman, the ox shall be stoned, and his owner also should of right be put to death. But there shall be laid on him a sum of money in atonement." From which is to be inferred that the money is paid only when " his owner shall of right be put to death," which cannot be when she is still alive. But did not R. Aqiba say that even in cases of damage her husband does not inherit from her ? Have we not learned in a Boraitha: " If one struck a woman and caused her to abort he must pay for the damage and pain to herself, and the value of the children to the husband; if her husband is dead he pays to *his* heirs; if the woman is dead he pays to *her* heirs. If she was a bondwoman and became free, or she was a proselyte, the one who has to make the payment need not pay, for he himself acquires title to the payment, as these classes of persons have no legal heirs." Hence we see that even for the damage and pain the payment must be made to her heirs and not to the husband. Said Rabba: The case was that she was a divorced woman; and so also said R. Na'hman: If the case was with a divorced woman, why should she not take a share of the money paid for the children ? Said R. Papa: The Scripture has awarded the money for the children to their father, even if they were begotten illegally, as it is written [Ex. xxi. 22]: " As the husband of the woman lay upon him."

Resh Lakish said: An ox that killed a bondman unintentionally is free from the payment of the thirty shekels, as it is written [ibid., ibid. 32]: " Thirty shekels shall be given to his master, and the ox shall be stoned," from which it is to infer that only when the ox is to be stoned the money is to be paid, but not otherwise. Said Rabba: The same is the case as regards atonement money in case the ox killed a freeman unintentionally, for it is written [ibid.]: " The ox shall be stoned, and his owner also should of right be put to death, but there shall be laid on him a sum of money in atonement," from which is to be inferred that only when the ox is stoned, etc., the atonement money is to be paid, but not otherwise. Abayi objected: We have learned: " (If one confess, saying) my ox has killed a certain person, or his ox, he has to pay on his own testimony." Does it not mean atonement money also ? Nay, it means the money for damages. If it is so, why does the latter part state:

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"My ox has killed the slave of a certain man; he is not compelled to pay on his own testimony"? Now if this is not the fine but damages, why should he not pay? Said Rabba to him: I could answer you that the first part treats of damages and the latter of fine, but I do not like to give you a *far-fetched* answer. Both parts treat of damages, but in the first instance the atonement money is paid upon his own testimony under the following circumstances: That witnesses came and testified that his ox killed a man, but were unable to testify whether he was vicious or non-vicious, and the owner admits that he was vicious, in such a case he has to pay the atonement money on his own testimony, but where there are no witnesses he pays only the damage, but not the atonement money. And in the case of a slave, if witnesses come and testify that the ox killed the slave, but they are unable to testify whether he was vicious or not, and the owner admits that he was vicious, he has not to pay the fine upon his own testimony, and where there are no witnesses he need not pay even the damages. R. Samuel b. Itzhak objected: We have learned: "The same liability one has for a freeman he also has for a bondman, either as to atonement money or as to the death penalty." Is there then any atonement money in case of a bondman? We must therefore say that it means damages; hence we see that one pays damages even on his own testimony. Some say that he himself answered this objection, and others say that Rabba said to him: This Boraitha is to be explained thus: In every case where one is liable to pay atonement money—for instance, a freeman—when done with intention and there is testimony of witnesses, he is liable under the same circumstances to pay a fine of thirty shekels in the case of a slave, and in case he is liable for damages only—as, for instance, when witnesses testify that he has done it without intention—in case of a slave under the same circumstances he pays only damages, but no fine; but if he himself admits, although in case of a freeman he has to pay damages, in case of a slave under such circumstances he is free. Rabha questioned Rabba: If one's fire has done damage without intention is there a liability or not? Shall we assume that it is only in case of an ox where, when intentionally he pays atonement money, when unintentionally he pays damage, but in the case of fire, where there is no atonement money at all (as, if intentionally, he is guilty of a capital crime), if it was unintentionally he shall not pay damages, or the atonement money is not to be taken into consideration, and the damages

must be paid at any rate; as we do not know of any reason why fire should be distinguished from an ox when done unintentionally, as both are his property? This remains unanswered. When R. Dimi came from Palestine he said in the name of R. Johanan thus: It could be written: "Shall be laid on him a sum of money in atonement." Why is the word "if" * added? To teach that the atonement money shall be paid when done unintentionally as well as if done intentionally. Said Abayi to him: According to your theory, why should we not say the same of a bondman, where it is also written [ibid. 31] "if," even when done unintentionally; and if you should say that so it really is, why then said Resh Lakish that if an ox killed a slave unintentionally he is free from the thirty shekels? He answered: What contradiction do you adduce? They are two different persons, and differ in their opinions. When Rabhin came from Palestine he said that R. Johanan has declared plainly that the same is the case with a slave when killed, even unintentionally, and that he deduced it from the word "if," as explained above.

"*A male or female minor.*" The rabbis taught: It is written [ibid. 31]: "If he gore a son or gore a daughter;" that is, to make one liable for little children as for grown persons. But is this not common-sense? There is a liability of a human being for a human being, and the same liability is of an ox for a human being; as in the former there is no difference as to whether young or old, so also in the latter case, and this can be inferred also by the following *a fortiori* conclusion: In the case of human beings, in which the murderer is guilty only when he is a grown-up person, but not a child, for it is written plainly "*man*" (and a child is not called "man"); in the case of an ox, in which there is no difference as to whether it is old or young (as the Scripture calls him ox from the very same day he was born, Lev. xxii. 27), so much the more that he shall be guilty for children as well as for grown persons. Why, then, is a verse needed? Nay (as to all that was said above could be objected thus): In the case of human beings there is a liability for the four certain things, which is not the case with an ox, and one might say, as in the case of an ox, there is no liability for the four things; so also should there be a distinction between chil-

* The text reads "Im," which literally means "if"; Leeser, however, translates it "but," according to the sense of the verse.

dren and grown persons; hence the above passage. From this passage we deduce only as to a vicious ox; whence do we know that as to a non-vicious one ? This is common-sense: As there is a liability for a grown man or woman, and the same liability is for children, and as to grown persons no distinction is made between a vicious and non-vicious ox, the same is the case with children. This can also be inferred by *a fortiori* conclusion: Grown persons, who are responsible for their acts, if they were killed by an ox there is no distinction made between a vicious and non-vicious one; so much the less in case of children, who are not responsible for their acts, that no distinction is to be made whether the ox was vicious or not. Is it not against the rule to draw an *a fortiori* conclusion from a rigorous one to a lenient one to make the lenient rigorous ? (It is deduced that no distinction is made between a vicious and non-vicious ox in regard to grown persons from the case of the children, and the verse, "If he gore a son," etc., speaks of a vicious ox; now you compare again the case of children to the case of grown persons, to say that as there is no distinction, so is none here, consequently you draw from the rigorous one, *i.e.*, grown persons, which is based only upon common-sense, to the case of children, where the Scripture says plainly that the ox must be vicious, and consequently lenient, as it can be said that only a vicious and not a non-vicious is meant, to make a non-vicious also liable.) And still we can say that the case of children is more lenient, for children are free from observance of the Law, which is not the case with grown man; therefore it is written: "If he gore a son, or gore a daughter," the repetition of "gore" being superfluous, to teach us that there is no distinction between a vicious and non-vicious ox, between injured and killed, and in all cases it must be paid.

MISHNA *VI.*: An ox that was rubbing against a wall whereby the wall fell upon a human being and killed him; if the ox intended to kill an animal and killed a man, or a non-viable child and killed a viable one, he is free.

GEMARA: Said Samuel: He is free from death, but he is liable to pay the atonement money. Rabh, however, says that he is free from both. But why shall atonement money be paid? Is he then not non-vicious ? (Is it not said that he was rubbing against the wall, in which case he is surely non-vicious, at least in this case ?) As Rabha explained this (*post*, page 112), that it was vicious in this respect as to fall into pits, so also here that

it was vicious in rubbing against the wall. But if so, then he must be put to death. It would be correct in the case of Rabha's explanation cited concerning a pit, because he noticed therein vegetables, and intending to eat of them he fell in, but in this case here what can be said? He was rubbing against the wall to derive benefit. How do we know that? From the fact that he continued rubbing even after the falling of the wall. But then is this the proximate cause? Is it not the remote cause, as digging up gravel? Said R. Mari, the son of R. Kahana: The case was that the wall was little by little removed by his rubbing until the very moment it fell, and therefore it was the proximate cause, but still there was no intention to kill.

There is a Boraitha which is a support to Samuel and an objection to Rabh, namely: "There are cases in which the ox is put to death and the owner pays atonement money, and there are other cases in which atonement money is paid, but the ox is not put to death, and still others in which the ox is put to death, but no atonement money is paid, and finally such cases in which there is no liability to either. How so? If there are both viciousness and intention, both atonement money is paid and the ox is killed. If viciousness without intention is present, atonement money only; non-viciousness but intentional, the ox is put to death, but no atonement money. Non-viciousness without intention, no liability at all. But if, however, he has done damage unintentionally R. Jehudah holds him liable and R. Simeon holds him free." What is the reason of R. Jehudah's decision? He compares it to atonement money: as the latter is to be paid if unintentional, so also in damages; and R. Simeon compares it to the killing of the ox: as the ox is not to be killed if it was unintentional, so also is the case with damages.

"*If the ox intended to kill an animal,*" etc. But how is the case if it intended to kill one man and killed another, is there a liability? If so, then this Mishna will not be in accordance with R. Simeon of the following Boraitha, in which he says "that even if he intended to kill one man and killed another he is also free." And his reason is because it is written [Ex. xxi. 29]: "The ox shall be stoned, and its owner," etc. The killing of the ox is equal to the death of its owner: as the owner cannot be put to death unless he killed *this* man intentionally, so also the ox is not killed unless it killed *this* man intentionally. But whence do we deduce that it is so in case of murder? Because

it is plainly written [Deut. xix. 11]: "And he lie in *wait for him*, and rise up against him," etc., which indicates that he must have the intention for the man he killed.

MISHNA *VII.*: An ox belonging to a woman, to orphans, or their guardian, or an ownerless ox, or an ox belonging to the sanctuary, or the ox of a proselyte who died without heirs, all those (if they kill a man) are put to death. R. Jehudah, however, holds that an ownerless ox, or that belonging to the sanctuary or to the proselyte in question are not put to death, for the reason that they have no owners.

GEMARA: The rabbis taught: "The word 'ox' is repeated seven times in the chapter of the Scripture treating of the goring of a man by an ox, which repetition means to include all those kinds of oxen stated in the Mishna. R. Jehudah, however, says that notwithstanding these repetitions, an ownerless ox, or one belonging to the sanctuary or to a proselyte are not put to death, because they have no owners. Said R. Huna: R. Jehudah makes him free even if he was consecrated or declared ownerless after the goring. Whence this theory? Because it is repeated in R. Jehudah's statement, "an ox that is ownerless *or* one belonging to a proselyte," etc., are they not both equally ownerless? Hence for the purpose stated. And so it is plainly stated in the following Boraitha: Furthermore, R. Jehudah said: Even if it was consecrated or made ownerless after goring, they are also free, as it is written [Ex. xxi. 29]: "And warning had been given to his owner," etc., which means that it is put to death then only when during the bringing to the court, the judgment, and its execution its owner is still in existence.

MISHNA *VIII.*: An ox that was sentenced to be put to death and his owner consecrated him, he is not consecrated. If his owner slaughtered him, his meat is prohibited. If, however, this was done before the completion of the sentence, he is consecrated, and if slaughtered his meat may be used.

If one delivered his ox to a gratuitous bailee or borrower, to a bailee for hire, to a hirer, all those substitute the owner as to responsibility for damage: a vicious one pays the whole, and a non-vicious one the half.

GEMARA: The rabbis taught: "An ox that killed a man; if before sentence he was sold or consecrated the act is valid, if slaughtered his meat may be used. If the bailee returned him to his owner the act is valid. If, however, all those enumerated

were done after sentence, neither of those acts is valid. R. Jacob, however, said that as regards the bailee the act is valid even if after sentence, and the point of their difference is thus: Whether the ox may be sentenced in its absence from before the court. The rabbis hold that the sentence must be pronounced in the presence of the ox. Now the owner may say to the bailee: If you would have returned him to me before sentence, I would have driven him away into the swamp (so that he could not be brought before the court), and R. Jacob, however, holds that as the sentence may be pronounced in his absence, there is no difference. What is the reason for the rabbis' theory? The verse quoted above, "The ox shall be stoned, and his owner," etc., from which is to infer that the ox is in this respect equal to his owner, as his owner could not be sentenced to death in his absence, the same is the case with the ox. R. Jacob, however, objected and said: The owner is different, because he could argue before the court, but for what purpose is the presence of the ox necessary in the court?

"*If he delivered him to a bailee,*" etc. The rabbis taught: The following four substitute the owner: The gratuitous bailee, the borrower, the bailee for hire, and the hirer. If the ox under the control of the above killed a man while being non-vicious, he must be put to death, and no atonement money is paid; if while being vicious, also atonement money is paid; and all of them with the exception of gratuitous bailee must pay the value of the ox to its owner. Let us see how was the case. If they guarded him as required, let all of them be free; if they have not guarded him as required, let even the gratuitous bailee also pay? The case was that they have not sufficiently guarded him. For the gratuitous bailee it is considered sufficient, and therefore he is free, but for all others it is not sufficient (because a greater degree of care is required of them). Let us see, according to whom is this Boraitha? If according to R. Meir, who says that a hirer is equal to a gratuitous bailee: "Why did not the Boraitha add to the gratuitous bailee also the hirer? And if it is according to R. Jehudah, who says that a hirer is equal to a bailee for hire, why did not the Boraitha add to the gratuitous bailee also that all of them in the case of a vicious ox are free from atonement money" (as R. Jehudah holds that even slight care is sufficient for the above substitutes)? Said R. Huna b. Hinua: The Boraitha is in accordance with R. Eliezer, who says that there is no guard for a vicious ox unless the knife, and he

also holds according to R. Jehudah, who says that the hirer is equal to a bailee for hire. Abayi, however, says that the Boraitha is in accordance with R. Meir, and it is as Rabbah b. Abuhu changed the statement of the rabbis as follows: One who hires an ox, how shall he pay? R. Meir says, as a bailee for hire, and R. Jehudah says, as a gratuitous bailee.

R. Elazar said: One who delivered his ox to a gratuitous bailee, and the ox did damage, the bailee is liable, but if he was injured he is free. Let us see how the case was. If the bailee agreed to guard him against injury, then let him be responsible if even he was *injured*, and even he did not let him be free even if he *did* damage. Said Rabha: The case was that he *did* take the responsibility, but he knew at the time that he was a goring ox, and common-sense dictates that his intention was to guard him against goring as it was his habit, but it could not enter his mind that he will be gored by others.

MISHNA *IX.*: If its owner properly tied him and locked him up, and still he broke out and did damage, be it a vicious or a non-vicious one there is a liability. Such is the dictum of R. Meir. R. Jehudah, however, holds that a non-vicious is liable, and a vicious is not, for it is written [Ex. xxi. 29]: "And he hath not kept him in," but here he had. R. Eliezer, however, says there is no guard for a vicious ox except the knife.

GEMARA: We have learned in a Boraitha: R. Eliezer b. Jacob said: "Whether vicious or non-vicious, if they were slightly guarded (from negligence) he is free from the *whole* damage." The reason for this is because he is in accordance with R. Jehudah, who said above that slight care is sufficient for a vicious ox, and he holds that even a non-vicious ox must also be guarded from the analogy of expression "gore." As in the case of a vicious one it is plainly written, "He hath not kept him in," so also it is in case of a non-vicious.

R. Ada b. A'hba said: R. Jehudah made him free (in our Mishna) from viciousness, but not from *non*-viciousness (*i.e.*, he must still pay half).

Rabh said: If he was vicious to gore with the right horn he is not considered vicious as to the left horn. According to whom is Rabh's saying? (The saying of Rabh is certainly not regarding the payment, as it is certain that even when he was vicious toward human beings he is not considered vicious toward an animal, and it is therefore self-evident that if it was known to be vicious with his right horn, no claim can be made that the

whole must be paid if he gored the first time with the left horn. Rabh's saying therefore must be interpreted to have reference to "taking care.") If it is in accordance with R. Meir even a non-vicious one must be taken good care of? And if according to R. Jehudah, who holds that only slight care is sufficient, then why is it necessary to make the distinction between viciousness and non-viciousness, as to goring with left and right horns: there is a distinction also in the very case of the right horn, viz., if no care at all was taken of him then the viciousness prevails, but if any care at all was taken of him, only the non-viciousness prevails and the viciousness is gone? It can be said that he is in accordance with R. Jehudah, but he does not hold of the theory of R. Ada b. A'hba. And Rabh's saying is to be explained thus: To find in one and the same ox both viciousness and non-viciousness, it can be only when he was vicious to gore with the right and not with the left horn; but if he was vicious as to both horns, then the element of non-viciousness can no more be found in him (*i.e.*, if no care at all was taken of him he is vicious in all respects, but if any care at all was taken the viciousness is gone and the non-viciousness remains).

"*R. Eliezer says for a vicious ox,*" etc. Said Abayi: The reason for R. Eliezer's saying is as we have learned in the following Boraitha: R. Nathan said: Whence do we deduce that one must not raise a noxious dog in his house, nor maintain a defective ladder? For it is written [Deut. xxii. 8]: "That thou bring not blood upon thy house."

CHAPTER V.

RULES CONCERNING A GORING OX; EXCAVATIONS ON PUBLIC AND PRIVATE PREMISES; EXCAVATIONS MADE BY PARTNERS, ETC.

MISHNA *I.*: Should an ox gore a cow and the new-born calf be found dead at her side, and it be not known whether she gave birth to it before the goring or by reason of the goring, the owner of the ox pays half the damage for the cow and one-fourth for the calf. So also should a cow gore an ox and her new-born calf be found alive at her side, and it be not known whether she gave birth before the goring or by reason of the goring, the owner of the cow pays half the damage from the body of the cow and one-fourth from that of the calf.

GEMARA: Said R. Jehudah in the name of Samuel: This is the dictum of Summachus, who holds that money about which there is a doubt as to whom it rightly belongs, must be divided. But the sages said: There is a principal rule—the burden of proof is upon the plaintiff. [For what purpose is the statement that there is a principal rule? It was necessary that, even when the plaintiff claimed positively while the defendant only said that he was doubtful about it (in which case one might say that there need be no proof at all), this rule apply.] The same we have also learned in the following Boraitha (the exact statement of the Mishna with the addition): This is the dictum of Summachus, but the sages say that the burden of proof is upon the plaintiff.

Said R. Samuel b. Na'hmani: Whence is this rule deduced? From [Ex. xxiv. 14]: "Whoever may have any cause to be decided, let him come unto them." That means, he shall produce proof before them. R. Ashi opposed: Why is a verse necessary? Is it not common-sense that one who feels pain goes to a physician? We must therefore say that this verse applies to the saying of R. Na'hman in the name of Rabba b. Abbuhu: Whence is it deduced that in case of a claim and counterclaim the claim must first be passed upon and judgment awarded and executed, and then the counterclaim must be proved (as at this

stage the former defendant is now the plaintiff)? From the above-quoted passage, which means that the plaintiff who has the cause to be decided shall be heard first. The sages of Nahardea, however, said that in some cases it might happen that the counterclaim must be passed upon first, and that is in case the judgment, if awarded against the defendant, would have to be collected from the latter's real estate; for if the judgment were allowed to be collected before the counterclaim was proved, the estate would sell much cheaper than if he should prove his counterclaim and sell his estate at a proper price.

"*So also should a cow gore an ox,*" etc. Half *and* a quarter of the damage! Why three-quarters—he has to pay only half? Said Rabha: The Mishna meant to say thus: If the cow is there, one-half of the damage is collected from the body of the cow; but if she cannot be found, one-quarter is collected from the body of the calf, and the reason is because it is doubtful whether the calf was with its mother at the time of the goring or not; but if we should be certain that it was, half would be collected from the body of the calf.

This decision of Rabha is in accordance with his theory elsewhere as to a cow that has done damage—the same may be collected from its offspring, because the latter is considered a part of her own body. A hen that has done damage—the latter cannot be collected from her eggs, for the reason that they are completely separated from the hen and it does not care any more for them.

Rabha said again (in the first instance, when the ox gored the cow): The cow and her offspring are not separately appraised, but both of them together (*i.e.*, the value of the cow before giving birth and that after she gave birth, and not the value of the cow separately and that of the calf separately); for otherwise it would work too much harm to the defendant. The same is the case if one cut off the hand of his neighbor's slave or if one damage his neighbor's field (that is, in each of those cases the value prior to doing the damage and that after doing the damage is ascertained, and thus the damage is appraised, and not by appraising separately the damaged part and the main body). Said R. A'ha the son of Rabha to R. Ashi: If in reality the law is so, what do we care for the defendant? let him suffer. Why, then, did Rabha protect him? Because the defendant might say: "I caused injury to a gravid cow, and therefore the appraisement must also be made of such a cow."

It is certain, if the cow belonged to one person and the calf to another, that for the reduction of the fatness it must be paid to the owner of the cow; but for the depreciation on account of the reduction in fulness, to whom is this to be paid? (*I.e.*, if while the cow was gravid the owner of the cow sold the calf to be born to another person, and through the injury the cow miscarried, and by reason thereof the cow became reduced both in fatness and in fulness (figure), both of which are elements making up the value of a cow; now, for the reduction in fatness the owner of the cow must be paid, for the calf has not contributed to it; but for the depreciation on account of the decrease in the fulness, shall the owner of the calf be paid? for the calf gave her that fulness, or both the cow and the calf contributed to it, and the value of this damage must be divided.) R. Papa says it is paid to the owner of the cow only. R. A'ha the son of R. Iki says that it must be divided, and so the Halakha prevails.

MISHNA *II.*: A potter that placed his pottery in the court of another without his permission, and the court-owner's cattle broke them, there is no liability. If the cattle were injured thereby, the potter is liable. If, however, he placed them there with permission, the court-owner is liable. The same is the case with one who placed his fruit in another's courtyard and it was consumed by an animal of the court-owner. Should one lead his ox into the court of another without permission and it be gored by the ox of the court-owner, or be bitten by his dog, there is no liability. If, however, the ox in question gored the court-owner's ox, or it fell into the well and spoiled the water, he is liable. If the court-owner's father or son was in the well (at the time, and was killed), he must pay atonement money. If, however, he led it there with permission, the court-owner is liable. Rabbi, however, says that in all these cases the court-owner is not liable unless he expressly undertook to take care of the ox.

GEMARA: Is the reason for the statement in the first part of the Mishna only because he placed them without permission, but if with permission the potter would not be liable for injuries to the animals of the court-owner, and we do not say that it is implied that the potter has assumed the care of the animals, and this can be only in accordance with Rabbi, who holds that wherever it is not expressly assumed there is no implied assumption to take care? Now, the latter part, which states: "If he placed them there with permission the court-owner is liable," is

certainly in accordance with the rabbis, who hold that there is an implied assumption even when nothing was expressly mentioned; and in the last part Rabbi declared that in all cases he is not liable unless the court-owner expressly assumed the care; hence the first and last parts will be in accordance with Rabbi, and the middle part in accordance with the rabbis? Said R. Zera: Separate the clauses, and say that the one who taught this part did not teach the other. Rabha, however, says: The whole Mishna can be explained to be in accordance with the rabbis, and that the case was that he entered with permission and the court-owner assured the safety of the pottery (and the potter assumed nothing), in which case he is responsible if even the wind should break them.

"*If he placed his fruit*," etc. Said Rabh: The case is only if she slipped on account of them; but if she consumed them (and by reason thereof died) there is no liability, for she was not compelled to eat them.

Come and hear: "One who led his ox into another's courtyard, and it consumed wheat which caused it diarrhœa and it died, there is no liability. If, however, he led it in with permission, the court-owner is liable." Why not argue here the same way, and say that it was not compelled to eat? Said Rabh: "You wish to contradict a case *with* permission by a case *without* permission? In the former event he assured the safety of the ox, and therefore he is liable if even the ox should choke himself."

The schoolmen propounded the following question: "When he assured the safety of the ox, did it only extend to himself (*i.e.*, to protect the ox against the injury by his own animals), or also to all cattle?" Come and hear: "R. Jehudah b. Simeon taught in Section Damages, of the school of Qarna: If one placed his fruit in the courtyard of another without permission and an ox came from some other place and consumed it, he is free; if, however, *with* permission, he is liable. Who is liable and who is free—is it not the court-owner?" (Hence we see that he must guard him also against injury by others?) Nay, it may be said that it has reference to the owner of the ox. If so, what difference is there whether it was with or without permission? There is: If with permission, it is to be considered the premises of the plaintiff, in which case the tooth is liable (for as soon as the court-owner allowed him to enter he thereby assigned him room in his court); but without permis-

sion, it cannot be considered that he consumed it "in *another* man's field," which is required in the case of the tooth, and therefore there can be no liability.

Come and hear: "If one lead his ox into a courtyard without permission and an ox come from another place and gore it, he is free; if, however, *with* permission, he is liable." Who is free and who is liable—is it not the court-owner? Nay, it is the owner of the ox. If so, what difference is there whether with or without permission? The Boraitha is in accordance with R. Tarphon, who says that there is an extra rule as to the horn if on the premises of the plaintiff, in which case he pays the whole. Now, if with permission, it is considered the premises of the plaintiff (for the reason stated above) and he pays the whole damage; but if without permission, it is equal to the case of the horn on public ground, in which case only half is paid.

It happened that a woman entered a house to bake, and the house-owner's goat having consumed the dough, became feverish and died. Rabha then made the woman pay for the goat. Shall we assume that he differs with Rabh, who said that it was not compelled to consume it? What comparison is this? There it was without permission, and therefore the safety was not assured; but here it was with permission, and therefore the safety of the goat was assured by the woman (for the reason stated further on, that in baking by a woman modesty is required, as she has to bare her arms and the owner of the house cannot stay in the room; it is therefore considered that he has assigned the whole room to the woman, and therefore she is responsible for the damage done to the house-owner). And why is this different from the following case: If a woman enter another's premises to grind her wheat without permission and the house-owner's animal consume the wheat, there is no liability. If, however, the animal was injured thereby, the woman is liable. The reason then is because it was without permission, but if with permission she would be free? There is a difference: In case of grinding wheat, where no modesty is required and the owner could be present, the care of the animal devolves upon him; but in case of baking modesty is required (as stated above).

If one lead his ox into a courtyard," etc. Rabha said: One who leads his ox into a courtyard without permission, and the ox digs an excavation in the courtyard, the owner of the ox is liable for the damage caused to the court, and the court-owner

is liable for the damages caused by the excavation (if he renounced ownership), although the Master said elsewhere, on the strength of the passage [Ex. xxi. 33]: "If a *man* dig a pit," a *man*, and not an *ox;* for here in this case he had to fill up the pit (before renouncing ownership), and by not so doing it is considered as if he dug it.

Rabha said again: "One who leads his ox into a court without the permission of its owner, and it injures the owner, or the latter is injured through it, he is liable. If, however, it lie down (and by doing so breaks vessels, or while being in such a position the court-owner stumbles over it and is injured), there is none." Does, then, the lying down relieve him from liability? Said R. Papa: Rabha means, not that the ox itself lay down, but that it lay down (voided) excrement and thereby soiled the vessels of the court-owner, in which case the excrement is considered a pit; and we do not find that there is a liability for damage to vessels by a pit. This would be correct according to Samuel, who holds that any obstacle is considered a pit; but as to Rabh, who holds that it is not considered a pit, unless ownership is renounced, what can be said? Generally from dung ownership is renounced.

Rabha said again: If one enter a court without permission and injure the court-owner, or the latter be injured through him (by jostling against him), he is liable; if the court-owner injure him, he is free. Said R. Papa: "This was said only in case the court-owner has not noticed him; but if he has, he is liable." What is the reason? Because he can say to him: "You have the right only to drive him out, but not to injure him." And each follows his own theory, for Rabha, and according to others R. Papa, said: If both of them were there with permission (*e.g.*, on a public highway), or both of them without permission, if one injure the other (by striking with the hand, although unintentionally), both are liable (for as to damages there is no difference whether with or without intention); but if one was injured through the other (as by jostling), they are free. The reason, then, is because both of them were either with or without permission; but if one was with and the other one without permission, the one who was with permission is free and the other is liable.

"*If he fall into the pit and spoil the water*," etc. Said Rabha: This was taught only when it was spoiled through the body (*e.g.*, when the body was soiled); but if it was so because

of the (putrefied) smell, he is free. And the reason is, because the carcass is only the *germon* (origin) of the smell, and for *germon* there is no liability.

"*If his father, his son,*" etc. Why so? Is he not a non-vicious one? Said Ula: It is in accordance with R. Jose the Galilean, who holds, with R. Tarphon, that the horn on the premises of the plaintiff pays the whole damage, so also here he pays the whole sum of atonement money, and for that reason he teaches, "if his father," etc., to indicate that it was the premises of the plaintiff.

"*If he lead him in with permission,*" etc. It was taught: "Rabh said: The Halakha prevails according to the first Tana, while Samuel holds that the Halakha prevails according to Rabbi."

The rabbis taught: "If he said: 'Lead in your ox and take care of him,' if he did damage, he is liable; if he was injured, there is no liability. If he, however, said: 'Lead in your ox and *I* will take care of him,' the reverse is the case." Is there not a difficulty in the explanation of the Boraitha? First it states, if he told him to lead in the ox and to take care of him he is liable if he did damage, etc.—then the reason is because he told him expressly to take care of him; but if nothing was said as to care, the reverse would be the case, for the reason that, when nothing is mentioned, the court-owner impliedly assumes the care. How, then, should the last part: "If he, however, told him: 'Lead in your ox and *I* will take care of him,' etc., be explained? Is it not to infer that the reason was because he expressly said that he would take care of him, but if nothing was said as to care, the owner of the ox is liable and the court-owner is free, for the reason that under such circumstances the court-owner does not assume the care, which is according to Rabbi, who holds that the court-owner is not liable unless he expressly assumes the care, and so the first part would be according to the rabbis and the last part according to Rabbi? Said Rabha: The whole Mishna can be explained to be in accordance with the rabbis, thus: Because it states in the first part "and *you* take care of him," it states also in the last part, "and *I* will take care of him." R. Papa said: The whole Mishna may be explained in accordance with Rabbi, but that he holds with R. Tarphon, who says that the horn on the premises of the plaintiff pays the whole, and therefore if he tell him, "*You* take care," the court-owner has not assigned him any room, and thus

it is to be considered as the horn on the premises of the plaintiff, which pays the whole; but if he keep silent, it is considered that he has assigned him room in the court, and thereby the court becomes a partnership, and under such circumstances only half is paid.

MISHNA *III.*: If an ox intend to gore another ox, and injure a woman and cause her to miscarry, the owner of the ox is free from paying for the child. If, however, a man intend to hurt another man, and hurt a woman and cause her to miscarry, he must pay for the child. How is this payment made? The woman is appraised as to the difference in her value (as a slave) before and after she gave birth. Said R. Simeon b. Gamaliel: If so, then her value increases after giving birth. We must therefore say that the worth of the infant is appraised and its value is paid to her husband if she has one, or to his heirs if she has no husband. If she was a manumitted slave or a proselyte, there is no liability.

GEMARA: The reason is only because it intended to gore another ox, but if it originally intended to gore the woman he is liable for the infant. Shall we assume that this is a contradiction to R. Ada bar A'hba, who said elsewhere that even in such a case there is no liability? Nay, R. Ada b. A'hba may answer that, even according to our Mishna, there is no liability even if it intended to gore the woman. But why does the Mishna say that it intended to gore another ox? Because in the last part it states a case where a *man* intended to injure another one, in which it is essential, for so states the Scripture; therefore the same expression was used.

"*How is this payment to be made,*" etc. The value of the infant? It ought to read "the increased valuation *caused* by the infant"? (for so does the Mishna state, that the woman is "appraised," etc.). It really means: "How does he pay the value of the infant and the increased valuation *caused by* the infant? The woman is appraised," etc.

"*Said R. Simeon b. Gamaliel,*" etc. What does he mean? Said Rabha: He means thus: Is, then, the value of a woman during pregnancy higher than after she gives birth—is not the reverse the fact? We must therefore say "that the worth of the infant," etc., and so also we have learned in a Boraitha elsewhere. Rabha, however, says: He means thus: Does, then, the increase in value of the woman belong wholly to the husband, and she has no share in the increase of value caused even

by her infant? The infant is appraised and its value paid to the husband, and the money for the increase in valuation is divided between the husband and the wife. We have so also learned plainly in a Boraitha, with the addition that each item must be separately appraised: the pain, the damage; the value of the infant, however, must be paid to the husband only, but the increase in valuation caused by it must be divided. If so, then the two statements of R. Simeon b. Gamaliel contradict each other? This presents no difficulty. The one case is that of a first-birth, and the other is not.

And the rabbis, who hold that the increase in valuation also belongs to the husband, what is their reason? As we have learned in the following Boraitha: From the Scripture, which reads [Ex. xxi. 22]: "And her children depart from her," do I not know that she was with child? Why does it state, "a woman with child"? To tell thee that the increase in value caused by pregnancy belongs to the husband. R. Simeon b. Gamaliel, however, applies the passage quoted to the following Boraitha: R. Eliezer b. Jacob said: He is not liable unless he struck her over the womb. And R. Papa explained the above statement of R. Eliezer b. Jacob, that he does not mean the womb only, but any part of the body except the arm or foot.

"*If she was a bondwoman,*" etc., "*or a proselyte woman,*" etc. Said Rabba: This is to be explained that he wounded her before her husband died, in which case the deceased acquired title to the money to be paid, and upon his death the same is inherited by the defendant, in whose possession the money still is (and so is the law as regards the property of a proselyte who died without leaving heirs); but if he wounded her after the death of her husband, the money is to be paid to her. Said R. Hisda: "Who is the author of this statement? Are, then, children as packages of money, that their ownership may pass from one to another? Where there is a husband alive the Scripture made an exception, in that the money to be paid should belong to him; but where there is none, no payment at all is to be made." Regarding this statement the Tanaim of the following Boraitha differ: "An Israelite's daughter that was married to a proselyte and she has conceived by him, and some one wounded her, if during the lifetime of the proselyte, the value of the infant goes to him; if after his decease, one Boraitha states that the defendant must pay to the mother and another Boraitha states that he is free."

According to Rabba's theory there is no doubt that the Tanaim differ, but according to R. Hisda's theory, in accordance with whom will be the Boraitha which states that he must pay? It is in accordance with Rabban Simeon b. Gamaliel, who said that the mother gets one-half of the money to be paid even when her husband is alive, and the whole if he is dead.

R. Iba the elder propounded the following question to R. Na'hman: One who took possession of the documents of a proselyte (which he held against the lands of an Israelite), what is the law? Shall we assume, of one who receives mortgages on estates, that his main intention is to take possession of the lands, and whereas of the latter the proselyte has as yet not taken possession, the one who took possession of the documents has acquired no title, because these documents are not considered property, or is it considered that the proselyte's intention was also as to the documents (and so they *are* his property)? He said to him: Answer me, my Master, could the intention of the proselyte be to wrap up a bottle in them? He answered: Yea, it may have been also for that very purpose.

Rabba said: "If an Israelite's pledge is in the hands of a proselyte and the latter dies, and another Israelite comes and takes possession of it, he may be deprived of the possession (by the owner of the pledged article). Why so? Because as soon as the proselyte died the lien on the pledge became null and void. If, however, a proselyte's pledge is held by an Israelite and the proselyte dies, and another Israelite takes possession of it, the pledgee has his lien on the pledge to the extent of his debt and the other one acquires title as to the balance. Why should not the pledgee's premises (on which the pledge is located) acquire the title for its owner? Did not R. Jose b. Hanima say that one's premises acquire title for their owner even without his knowledge? It may be explained that he was not there, and therefore when the owner is there, and he wishes he himself could acquire title, his premises can also do so for him; but where there is no owner to acquire title himself, his premises cannot do so for him. And so the Halakha prevails.

MISHNA *IV.*: One who digs a pit on private ground and opens it into public ground, or *vice versa*, or on private ground and opens it into the private ground of another person, is liable.

GEMARA: The rabbis taught: One who digs a pit on private premises and opens it into public premises is liable; and this is the kind of a pit that was meant by the Scripture. Such

is the dictum of R. Ishmael. R. Aqiba says: The pit mentioned in the Scripture is where one renounced ownership to his premises (on which there was a pit), but did not renounce it to the pit. Said Rabba: As to a pit on public ground, all agree that there is a liability, but as to one on one's own premises, R. Aqiba holds that even in such a case there is a liability, for it is written [Ex. xxi. 34]: "The owner of the pit"; that means that the Scripture meant a pit that has an owner, while R. Ishmael holds that it means the one to whom the cause of the injury previously belonged. But what does R. Aqiba mean by his saying, "That is the pit meant by the Scripture"? Thus: Why should this case be free from payment? Is this not the very case with which the Scripture began as regards payment?* R. Joseph, however, says, that as to a pit on private premises all agree that there is a liability, for the reason stated by R. Aqiba; they only differ as to a pit on public ground. R. Ishmael holds that one is also liable in such a case, thus: It is written [ibid., ibid. 33]: "And if a man open a pit, or if a man dig a pit"; now, if for the opening one is liable, so much the more is he for the digging? We must therefore say that the liability came to him because of the digging and opening only (*i.e.*, that neither the premises nor the pit is his, as being on public ground). R. Aqiba, however, may explain it thus: Both statements are necessary, for if the Scripture should state only as to the opening, one might say that only in case of opening it is sufficient to cover it, but in case of digging it is not, unless he stuff it up; and if the Scripture should state only the digging one might say that only in such a case it must be covered, for he has done some substantial act; but in case of opening only there is no need even to cover it, for no substantial act was done. Hence the necessity of both verses. And what does R. Ishmael mean by his statement, "This is the pit," etc.? He means that this is the pit with which the passage began as to damages.

There is an objection from the following: One who digs a pit on public ground and opens it into private ground is free, although it is not permitted to do so, for the reason that no excavation must be made under public ground. One who digs

* Rashi explains that of the pit mentioned as regards payment it is plainly written, "the *owner* of the pit shall pay"; of a pit, however, on public ground the Scripture begins with, "If one *open* a pit"—and the Mishna treats of one that *dug* a pit. Hence R. Aqiba's statement.

a round, oval, or obtuse-angle-shaped pit on private ground and opens it into public ground is liable. And one who digs pits on private premises adjoining public ground, as, for instance, those who dig pits to lay foundations for buildings, is free. R. Jose b. Jehudah, however, makes him liable, unless he put up a partition ten spans high, or unless the pit was at least four spans distant from the pathway for man and beast. Now the first Tana holds him free, because it was for laying foundations; but otherwise he would also hold him liable? (Hence there is a liability for a pit on one's own premises?) According to whose theory is the statement of the first Tana? It would be correct according to Rabba, for it could be explained that the first part is according to R. Ishmael and the last part according to R. Aqiba; but according to R. Joseph, the last part is in accordance with all and the first part in accordance with none? R. Joseph may say that the whole Boraitha is in accordance with all, but the first part treats of a case where he renounced ownership neither to the premises nor to the pit (and although he must not do so, nevertheless there is no liability). Said R. Ashi: Now that we arrive at the conclusion that according to R. Joseph's theory the Boraitha is in accordance with all, the same may be explained also according to Rabba's theory that the whole Boraitha is in accordance with R. Ishmael; but the reason why, according to your inference, there would be a liability, if it is not for laying a foundation, is because he extended the excavation under the public ground (and therefore, if not for laying foundations, it should be considered digging on public ground).

The rabbis taught: One who digs and opens a well and delivers it over to the community is free (if any accident happened). Otherwise he is liable. And so also was the custom of Nehunia the pit-digger, to dig and open wells and deliver them over to the community. And when the rabbis heard of it, they said: "He is acting in accordance with the Halakha."

The rabbis taught: It happened to the daughter of the very same Nehunia, that she fell into a large well. They came and informed R. Hanina b. Dosa of it. During the first hour he said to them: "Go in peace"; and so also during the second. At the third (when there was fear that she might have died), he said that she was out already and saved. When the girl was asked who saved her, she said that a ram passed by led by an old man (the ram of Isaac led by Abraham), who saved

her. When R. Hanina b. Dosa was asked whether he knew of her safety by prophecy, he said: I am no prophet, nor am I the son of a prophet, but I thought to myself, "Can it be that the children of that upright man (Nehunia, who was digging wells to enable the pilgrims to drink water from them) shall die by the very thing he was taking so much pains to prepare for the welfare of Israel?" Said R. A'ha: Notwithstanding this, his son died of thirst. The reason is, that the Holy One, blessed be He, is particular with the upright around Him, even on a hairbreadth, as it is written [Ps. l. 3]: "And round him there rageth a mighty storm" * (and there must have been some sin committed by Nehunia for which he was punished). R. Nehunia says: From the following passage [ibid. lxix. 8]: "God is *greatly* terrific in the secret council of the holy ones, and fear-inspiring over all that are about him." R. Hanina said: One who says that the Holy One, blessed be He, is liberal (to forgive every one his sins), his life may be disposed of liberally (for he encourages people to sin), as it is written [Deut. xxxiii. 4]: "He is the Rock, his work is *perfect;* for all his ways are just." R. Hana, and according to others R. Samuel b. Na'hmani, says: It is written [Ex. xxxiv. 6], "Long-suffering" in the plural, and not in the singular, to signify that He is long-suffering towards the upright and also towards the wicked.

The rabbis taught: One shall not remove stones from his own premises to public ground. It happened once that one did so, and a pious one passing by at the time and seeing him do that said to him: "Thou ignoramus, why dost thou remove stones from premises not belonging to thee to thy own premises?" He laughed at him. Some time later he was compelled to sell his lands, and while walking on the public highway in front of his former lands he stumbled over the stones he once piled up. He then exclaimed: "I see now that the pious one was right in his saying!"

MISHNA *V.*: One who digs a pit on public ground and an ox or an ass falls into it (and is killed), he is liable. It matters not as to the shape of the pit, whether round, oval, or a cavern, rectangular or acute-angular, in all cases he is liable. If this is so, then why is it written "pit" [בור]? To infer from this that as a round pit in order to be sufficient to cause death must

* The Hebrew term is "Nisarah," and the Talmud explains it to mean a "hair," from the Hebrew word "saar" (a hair).

be no less than ten spans deep, so also all other forms must be at least ten spans deep. If they were of less depth, however, there is no liability for death; but for injuries there is.

GEMARA: Rabh said: The pit for which the Scripture made one liable is because of the vapors (therein contained), but not because of the shock (the animal receives). From this may be inferred that Rabh holds that the vapors kill the ox for which the digger of the pit is liable; if the ox should be killed not by the vapors, but by the shock received at the bottom of the pit, there should be no liability, because the ground is considered ownerless. Samuel, however, holds because of the vapors, and so much the more because of the shock; and if one might say that the Scripture meant only as to the shock and not as to the vapors, and therefore if it should be proved that the death was caused by the vapors and not by the shock there should be no liability, it would be incorrect, for the Scripture is testifying that the digger of a pit is liable, and even if the pit were filled with wool sponges. On what point do they differ (for according to both, if the ox was killed he must be paid for)? The difference is in case he formed a hill (ten spans high) on public ground (from which the ox fell down and was killed): according to Rabh he is not liable, while according to Samuel he is. What is the reason of Rabh's opinion? The passage states [Ex. xxi. 33], "*Fall* into it," which signifies that there must be the usual way of falling (into an excavation, and face downward), but according to Samuel "fall" means in any manner.

There is an objection from our Mishna: If so, then for what purpose is written "pit," etc.? Now, it would be correct according to Samuel, for the "so also," etc., would include also a hill on public ground; but according to Rabh, what does this include? It includes rectangular and acute-angular pits. But are these not expressly stated therein? They are first stated, and then it is explained whence they are deduced; and it was necessary to enumerate all the forms of a pit, to teach that in each of them there are sufficient vapors to kill, if they are ten spans deep. It happened that an ox fell into a lake from which the neighboring lands used to be irrigated, and its owner slaughtered it. R. Na'hman nevertheless declared him *trepha* (illegal, because, according to his theory, the limbs of the ox were broken by the fall). The same, however, declared that if the owner would spend only one kabh of flour in going around and asking the law in his case, he would learn that if the animal

under such circumstances should be alive twenty-four hours after the fall it could be held fit for eating, and he would not lose his ox, which is worth many kabhim of flour. From this we see that R. Na'hman holds that an animal may be killed from shock in a pit less than ten spans deep.

Rabha objected to R. Na'hman from our Mishna: "If they were less than ten spans deep and an ox or an ass fell into them and was killed, there is no liability." Is not the reason because there is no shock? Nay, because there are no vapors. If so, then why is it stated further: "If he be injured, he is liable." Why so—there are no vapors? He answered: "There are no vapors sufficient to kill, but sufficient to injure."

He again objected from the following Boraitha: It is written [Deut. xxii. 8]: "If any one were to fall *from* there"—this signifies that it means only *from* there, but not there*into*. How so? If the level of the public highway were ten spans higher than the roof of the house, so that some one might fall from the highway to the roof, there is no liability (because there was no obligation to make a battlement); if, however, the highway were ten spans lower than the roof, there is a liability (for a battlement has to be made). Now then, if shock in an excavation less than ten spans deep also kills, why state *ten?* He answered: "This case is different, for it states 'house,' and less than ten cannot be called a 'house.'"

MISHNA *VI.*: When a pit belongs to two partners, and one of them passes by and does not cover it, and so also does the second, the latter only is liable.

GEMARA: Let us see. How can there be a pit of two partners on public ground? This case could be if we should say that the Halakha prevails in accordance with R. Aqiba, who holds one liable for a pit even if it be on his own premises, and partnership in the pit would be possible if both partners dig a pit on their premises and subsequently renounce their ownership to the premises but not to the pit; but if the Halakha prevails according to him who says that if one dig a pit on his own premises there is no liability, how is it possible on the one hand that there should be liability for the same pit on public ground, and on the other hand how can there be a partnership pit on the public ground? Shall we assume that both of them together hired an agent to dig the pit for them? Is there not a rule that there can be no agent to commit a transgression, for the agent ought not to commit any transgression if even he was hired to

do so? Consequently the partners could not be responsible for the acts of the agent. If we assume that the partnership consisted in that each of them dug five spans deep, then there can be no partnership, for the act of the first one can be taken into account according to Rabbi's theory only as to injuries; but even according to him as to death, and according to the rabbis' theory as to both injuries and death, it cannot be counted. How, then, can there be a partnership in a pit? Said R. Johanan: It is possible if both of them together removed a lump of earth from it which completed it to make it ten spans deep.

Where are the theories of Rabbi and his colleagues, mentioned above, stated? In the following Boraitha: "If one dig a pit nine spans deep and another one complete it to make it ten deep, the latter one is liable. Rabbi, however, says: The latter one only is liable in case of death, and both are liable in case of injuries."

What is the reason of the rabbis' theory? It is written [ibid., ibid. 33]: "And if *a man* dig a pit," which signifies that it must be by *one* only. Rabbi, however, explains this passage to mean that it must be dug by a *man* and not by an ox.

The rabbis taught: "If one dig a pit ten spans deep and another one complete it to make it twenty, and still another one make it thirty deep, all of them are liable." There is a contradiction from what we have learned in the following: "If one dig a pit ten spans deep and another one plaster and lime it (and thereby makes it narrow and increases its vapors), the last one is liable." Shall we not assume that the one case (where all are liable) is according to Rabbi and the other is according to his colleagues?

Said R. Zbid: "Both may be explained to be according to Rabbi only, thus: The case where all are liable is correct, as stated, and the case where only the last one is liable is where there were originally in it not sufficient vapors even to injure, and the other one by his acts produced so much vapors as to be sufficient both to injure and kill."

Rabha said: "If one place a stone at the edge of a pit which is less than ten spans deep and thereby complete its walls to measure ten spans, whether he is responsible or not would raise the same difference of opinion as between Rabbi and his colleagues stated above." Is this not self-evident? One might say that if one dig one span more in the *bottom*, and by doing so he increase the vapors to be sufficient to kill, he is liable,

because the vapors produced by him killed the animal; but if he raise the walls at the top (by placing the stone), by which he did not increase the vapors, as they were there already, one might say that he was not liable, because the animal was not killed by the vapors produced by him—he comes to teach us that there is no difference.

Rabba bar bar Hana in the name of Samuel bar Martha said: A pit eight spans deep, two of which are filled with water, there is a liability. Why so? Each span of water equals two of dry ground. The schoolmen propounded a question: If the pit was nine spans deep and only one span of them was filled with water, what is the law—shall we say that as there is only a little water there are no vapors in it, or shall we say that as it is nine spans deep the vapors of the water complete it to make it ten? Again, if the pit was seven spans deep, three of which were filled with water, what is the law—shall we say that as there is much water in it there are vapors, or because it is not sufficiently deep there are none? This remains unanswered.

R. Shizbi questioned Rabba: "If one dig a pit ten spans deep and another widen it (toward one direction only), what is the law?" He answered: "Then he diminished the vapors!" The former rejoined: "But he increased the possibility of being injured?" Rabba made no answer. Said R. Ashi: "A case of this kind must be examined. If he fell in through the side which was widened, then he surely increased the possibility of falling in, and he is responsible; if, however, he fell in through the other side, then he diminished the vapors, and he is not."

It was taught: "A pit the depth of which is of the same dimensions as its width, Rabba and R. Joseph, both in the name of Rabba bar bar Hana quoting R. Mani, differ as to the decision of those quoted: One holds that there are always vapors (sufficient to kill) therein unless the width exceeds its depth, and one holds that there are no vapors therein unless the depth exceeds its width."

"*If one passed by and did not cover it.*" From what time on is he free? (That we say that the other one was charged with covering it, for the case undoubtedly is that the first one not only passed by but also used the pit; because if not so, then the first one ought to be liable as well, as it was negligence also on his part not to cover it.) As to this the following Tanaim differs: "One is drawing water from a well and another comes telling him to let him draw water, as soon as he lets him do so,

the liability of the first ceases. R. Eliezer b. Jacob, however, says that the liability ceases from the moment he delivered him the cover of the well. On what point do they differ? R. Eliezer b. Jacob holds that the theory of choice * applies to such a case, and each drew water from his own part (and therefore the second is not considered to have borrowed from the first his share, so as to be charged with the care of the whole, and for that reason both are liable in case of damages; but if he accepted the cover, he thereby became charged with the care of the whole), and the rabbis hold that the theory of choice does not apply to such a case. R. Elazar said: One who sells his well, title passes with the delivery of the cover. How was the case? If he sold it for money, let the title pass by the payment of the money; if by occupancy, let the title pass by this act? The case was by occupancy, which requires that he should expressly tell him, "go and occupy and acquire title"; and if he delivered the cover to him, it is considered as if he told him so.

R. Jehoshua b. Levi said: One who sells his house, the title passes with the delivery of the keys (as it is the same as the delivery of the cover of the pit).

Resh Lakish in the name of R. Janai said: "One who sells a flock of cattle, title passes with the delivery of the Mashkhukhith (the drawing-rope). How was the case? If he drew them (removed them from one place to another), let title pass by this act? If by delivery, let title pass by doing this? The case was that he drew them, which requires that the vendor shall tell the vendee expressly, "Draw them and acquire title," and as soon as he delivered the Mashkhukhith it is considered as if he told the vendee expressly, "Draw, and acquire title to them." What is meant by Mashkhukhith? It means the bell. R. Jacob said: "It means the forerunning goat kept at the head of the flock as leader, as a certain Galilean lectured in the presence of R. Hisda: When the shepherd gets angry at his flock, he blinds the leading-goat at the head of the flock (so that the leader falls and with him all the flock)."

MISHNA *VII.*: If the first one covered it, but when the second one passed by he found it uncovered and did not cover it, the latter is liable. If the owner of a pit properly cover it, and still an ox or an ass fall into it and is killed, there is no liability. If however, he do not properly cover it, he is liable.

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* See Erubin, pages 80–82.

If an ox fall forward, face downward, into a pit by reason of the noise caused by the digging, there is a liability; if, however, it fall backward, there is none. If an ox or an ass with its housings fall into it and the housings be damaged, there is a liability for the animal but not for the housings. If there fall therein an ox, deaf, raging, or young, there is a liability (explained further on). If a boy or a girl, a male or a female slave, fall in, there is none.

GEMARA: Until what time is the first one free? Said Rabh: Until he again knows of his own knowledge that the pit is uncovered. Samuel, however, says: Until he is informed, even if he has not seen it himself. R. Johanan says: Time must be allowed him until he could be informed and could hire workmen to cut wood and cover it.

"*If he cover it properly,*" etc. If he covered it properly, how could the animal fall in? Said R. Itz'hak bar bar Hana: The case was, that the cover became rotten from the inside (and could not be noticed).

The schoolmen propounded the following question: "If he covered it sufficiently to withstand oxen but not camels, and camels came along and made the cover shaky and then oxen fell therein, what is the law? Let us see. How was the case? If camels are usual there, then certainly the act is wilful; if they are not, then it is only an accident? The question is only where camels come there at times. Shall we say that, because camels do come there, it is considered wilful, for he should have had it in mind, or do we say that because at that time they were not there it might be considered an accident?" According to others the schoolmen did not question as to such a case; for there is no doubt that, as long as they came at times, he should have had it in mind, but what they did question was this: If he covered it sufficiently to withstand oxen but not camels, and the latter are usual there and the cover became rotten from within, what is the law? Do we say that *because* it is considered wilful as to camels it is so also as to allowing it to rot, or that the theory of *because* does not apply here? Come and hear: "An ox that was deaf, raging, young, or blind, or an ox that walked in the night-time, he is liable; if, however, the ox was sound and it was in the day-time, he is free." Now, why should it be so? Why not say *because* it is considered wilful as to an unsound ox it is also considered so as to a sound one? Infer from this that the theory of *because* does not apply to such cases.

"*If it fell in forward,*" etc. Said Rabh: By "forward" is meant that it fell on his face, and by "backward" that it struck the back of its head against the bottom of the pit. And both of them have reference to the pit. [And this is in accordance with his theory that the Scripture made one liable in case of a pit only because of the vapors, but not because of the shock.] Samuel, however, says: "In case of a pit there is no difference whether it fall forward or backward, but he is liable." [For he follows his theory as to the vapors, and so much the more because of the shock.] But how is the case possible that when it fall backward from the sound of the digging he shall be free? As, for instance, when it stumbles over the pit and falls backward and strikes outside of the pit. Samuel objected to Rabh from the following Boraitha: "As regards a pit, whether it fall backward or forward, he is liable?" This objection remains.

R. Hisda said: Rabh admits in case of a pit on one's own premises that he is liable, because the owner of the ox may say, "You are liable either way; for whether he died from the vapors or from the shock, it was yours." Rabha, however, says: The case in the above Boraitha, which states that he is liable if even the ox fall backward, was that he turned over; that is, he first fell face downward, but before he reached the ground he turned over and fell on his back, and therefore it is the vapors that he inhaled while falling face downward that kill him. R. Joseph says: The Boraitha in question does not mean to say that the owner of the pit is liable, but, on the contrary, that the owner of the ox is liable, and it treats of a case where the ox did damage to a well, namely, by (entering a courtyard without permission, the owner of which renounced ownership neither to the courtyard nor to the well, and) falling into the well, spoiling the water therein contained; in which case he is liable, no matter which way it fell. R. Hanina taught in support of Rabh: It is written: "And fall"—that means that the falling should be in the usual manner, face downward. From this it was said that if he fell face forward into a pit from the sound of the digging there is a liability; if backward from the same cause, there is none.

The Master said: "If he fall face downward from the sound of the digging, there is a liability." Why so? Was this not caused by the one who was doing the digging? (In this case it is assumed that the owner has hired another person to do the digging, and the latter is only the *germon* (medium), and there

is no liability for being the *germon?*) Said R. Simi b. Ashi: It is in accordance with R. Nathan, who said that the damage must be paid by the owner of the place where it was done, for the reason that the digger cannot be liable, because he is only the *germon* of the damage, as we have learned in the following Boraitha: "An ox that pushed another ox into a pit, the owner of the ox, and not the owner of the pit, is liable. R. Nathan, however, said that each one of them pays half (for both have their share in it)." But have we not learned in another Boraitha: "R. Nathan said: The pit-owner pays three-fourths and the owner of the ox one-fourth"? This presents no difficulty: One case treats of a vicious and the other of a non-vicious ox. But what does he hold in case of a non-vicious ox? If he holds that each one has done the *whole* damage, let each one pay half? And if, on the other hand, he holds that each one has done *half* the damage (and therefore the owner of the ox pays as for a non-vicious one one-fourth, which is half of the damage he did), only three-fourths are paid and one-fourth is suffered by the plaintiff? Said Rabha: R. Nathan was a judge, and he dived into the very depth of the Halakha. He holds that each has done only half the damage; but as to the objection raised that the owner of the ox should pay only one-fourth, it may be said that the owner of the killed ox may say to the owner of the pit: "I found my ox in your pit and you killed him; therefore, whatever I can realize from the owner of the ox who pushed mine in I will, and the balance you will have to pay."

Rabha said: "One who places a stone on the edge of the opening of a pit and an ox stumbles over the stone and falls into the pit," as to this question the difference of the rabbis and R. Nathan comes in (according to the rabbis the one who placed the stone is liable, for he caused the fall, and he cannot be considered as the *germon*, for the placing of a stone in itself is considered the same as a pit; and according to R. Nathan both are liable, for both contributed). Is this not self-evident? Lest one say: In that case the pit-owner may say to the owner of the ox, "Were it not for my pit your ox would have (instead of pushing him in) killed him"; but here, in this case, the one who placed the stone may say to the pit-owner, "Were it not for your pit, what harm would my stone have done him? Had he stumbled over, he would have gotten up at once?" It therefore teaches that he may, however, say to him, "Were it not for your stone, he would not have fallen into the pit."

Rabha said: An ox and a man who together push some other into a pit (so that the ox, the man, and the pit have all contributed), as regards damages all are liable; as regards the four things and the value of the infant (if it should be the case), the man is liable and the others are free; as to payment of atonement money and the thirty shekels for a slave, the ox is liable and the others are free; as regards damage to vessels and an ox that became desecrated and was redeemed, the man and the owner of the ox are liable, and the owner of the pit is free. Why is the owner of the pit free in this latter case of a redeemed ox? Because it is written [Ex. xxi. 36]: "And the dead shall belong to him," which means in a case where the dead can belong to him, excepting this case (for although it was redeemed the carcass cannot be sold but must be buried).

"*If an ox fall in,*" etc. Our Mishna is not in accordance with R. Jehudah of the following Boraitha: "R. Jehudah makes one liable for damages to vessels caused by a pit." What is the reason for the rabbis' theory? It is written [ibid.]: "And an ox or an ass fall therein," which signifies an ox but not a man, an ass but not vessels. R. Jehudah, however, holds that the "or" means to add also vessels. Now, according to R. Jehudah, who admits that the word "ox" means to exclude man, what does the word "ass" mean to exclude? Therefore said Rabha: The necessity of stating "ass" as regards a pit according to R. Jehudah, and "lamb" as regards a lost thing according to all, is really difficult to explain.

"*If an ox, deaf,*" etc. What does this mean? Shall we assume that the ox *belongs* to a deaf person, etc., but if he belongs to a sound person there is no liability? How is that possible? Said R. Johanan: It means that the *ox* was deaf, etc. But if he was sound, there is no liability? Said Rabha: "Yea, an ox that is deaf, etc., but if he was sound there is no liability, because a sound ox is capable of taking care of himself. The following Boraitha is plainly in support of the above: If there fall therein a deaf, raging, young, or blind ox, or an ox walking in the night-time, there is a liability. If it was a sound one, however, and in the day-time, there is no liability.

MISHNA *VIII.*: There is no difference between an ox and another animal as regards falling into a pit; to have been kept distant from Mount Sinai [Ex. xiii.], as to payment of double, to restitution of lost property; as regards unloading; muzzling, kilayim [of species], and as regards Sabbath. Neither is there

any difference between the above-mentioned and a beast or bird. If so, why does the Scripture mention "ox or ass"? Because the verse speaks of what is usual.

GEMARA: Concerning falling into a pit, it reads [Ex. xxi. 34]: "In money unto the *owner* thereof," which signifies any animal that has an owner. Concerning Mount Sinai, it reads [ibid. xix. 13]: "Whether it be *animal** or man, it shall not live," which includes also beasts; and the word "whether" includes also birds. Concerning payment of double, it reads [ibid. xxii. 8]: "For *all* manner of trespass," which signifies that every manner of trespass (wilfulness and even as regards inanimate subjects). Concerning restitution of a lost thing, it reads [Deut. xxii. 3]: "Every lost thing of thy brother's." Concerning unloading, we deduce it from the analogy of expression of "ass" used here, and in regard to Sabbath [Deut. v. 14] (as concerning the latter, other animals are also included, so also here). Concerning muzzling [Deut. xxv. 4], we deduce it from the analogy of the term "ox" used here, and concerning Sabbath [ibid.]. Concerning kilayim, if it relates to that of ploughing, we deduce it from the analogy of the term "ox" in the manner just stated; if it relates to that of coupling of animals, it is deduced from the analogy of the word "any of thy cattle" used here, and concerning Sabbath. And whence do we know that it is so as to Sabbath itself? From the following Boraitha: R. Jose says in the name of R. Ishmael: At the first commandments it is written [Ex. xx. 10]: "Thy man-servant, nor thy maid-servant, nor thy cattle"; and at the second commandments it is written [Deut. v. 14]: "Nor thy *ox*, nor thy *ass*, nor any of thy cattle." Why were they expressly stated? Are, then, the ox and the ass not included in "cattle"? To tell thee that, as the terms "ox" and "ass" mentioned here include beasts and birds, to put them on the same footing, so also, wherever these two terms are mentioned, they include beasts and birds. But perhaps the statement in the first commandments should be taken as *general* and that of the last commandments as *particular*, and as there is a rule that the *general* includes nothing but the *particular*, this means to say that only ox and ass are meant, and nothing else? Nay, it states, at the last commandments, also "*all*† of thy cattle," and the word

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* Leeser translates "beast."

† The Talmud translates the Hebrew term literally, "all," while Leeser translates it "any."

"all" adds all other beasts. Is it really so, that wherever "all" is written it adds something? Is not the same word used at tithing, and still it is construed to be a case of *general* and *particular?* (See Erubim, p. 64.) We may say that "all" is sometimes also a *general*, but in this particular instance it must be explained only as to add; for it would have been sufficient to state only "and cattle," as it does in the first commandments, and still it states, "and *all* cattle," to infer that it plainly means to add.

Now, having come to the conclusion that this "all" means to add, why was it necessary to state "cattle" in the first and "ox" and "ass" in the last commandments? It can be explained that these particular expressions were mentioned for the purpose of deducing muzzling, unloading, and kilayim by the analogy of expression stated above. If also (that as regards kilayim it is deduced from Sabbath), let even a man be prohibited from drawing a wagon together with an animal, as he is also prohibited as regards Sabbath? Why, then, have we learned in the following Mishna: "A man is permitted with all of them to plough and draw"? Said R. Papa: One of the inhabitants of Papanai knew the reason for that, and that was R. A'ha bar Jacob, who explained it thus: It is written [ibid. 14]: "In order that thy man-servant and thy maid-servant may rest as well as thou"—that means that they are compared to them only as regards rest, but not as regards any other thing.

R. Hanina b. Egil asked R. Hyya b. Aba: Why in the first commandments is it not written "that it may be well with thee," and in the second commandments it is so written [Deut. v. 16]? He rejoined: "Instead of asking me for the reason, you had better ask me whether it is so written at all; for I did not notice it. You had better go to R. Tan'hum b. Hanilai, who used to frequent R. Joshua b. Levi, who was well versed in Agadah." He went there and got the answer from R. Tan'hum. From R. Joshua b. Levi I heard nothing about it, but so told me Samuel b. Na'hum the brother of R. Aha b. Hanina's mother [according to others, the father of the same]: The reason is because the first commandments (contained on the tables) were destined to be broken. And if so, what of it? Said R. Ashi: If this had been written thereon and subsequently (the tables) had been broken, Heaven save! "good" would have ceased from Israel.

R. Jehushua said: One who sees the letter "*Teth*" in his

dream, it is a good omen for him. Why so? Because the first time this letter is used in the Scripture is in the word "*Tobh*" (good) in the verse [Gen. i. 4]: "And God saw the light, that it was good (tobh)."

"*And so also a beast,*" etc. Said Resh Lakish: In this Mishna Rabh teaches us that a cock and a peacock and a pheasant are considered kilayim with each other. Is this not self-evident? Said R. Habiba: Because they are usually raised together, one might say that they are one species. Hence this statement.

Samuel said: The ordinary goose and the wild goose are considered kilayim. Rabha b. R. Hanan opposed. Why so? If because the one has a long beak and the other a short one, then let a Persian and an Arabian camel also be kilayim, because the one has a thick and the other a thin neck? Therefore said Abayi: The reason is because the one has his testicles on the outside, while the other has them inside. R. Papa said: The one hatches one egg at a time, while the other hatches many at a time.

CHAPTER VI.

REGULATIONS CONCERNING THE GUARDING OF ANIMALS AGAINST DOING DAMAGE. CONCERNING THE STARTING OF FIRE; IF IT PASSES OVER A WALL. FOR WHAT DISTANCES PASSED BY A FIRE IS THE ONE WHO STARTED IT LIABLE?

MISHNA *I.*: If one drive his sheep into a sheep-cot and properly bolt the gate, but still they manage to come out and do damage, he is free. If he do not properly bolt the gate, he is liable. If they break out in the night time, or robbers break in the gate, and the sheep come out and cause damage, he is free. If the robbers lead them out, they are responsible for the damage. If one exposes his cattle to the sun, or he places them in the custody of a deaf-mute, a fool, or a minor, and they break away and do damage, he is liable; if, however, he places them with a (professional) shepherd, the latter substitutes him (as regards liability for damages). If the cattle fall into a garden and consume something, the value of the benefit they derive is to be paid. If, however, they enter the garden in the usual way, the value of the damage is paid. How is the value of the damage to be ascertained? It is appraised how much a measure of the land required for planting a saah was worth before and how much it is worth after. R. Simeon says: If they consume ripe fruit, the value of ripe fruit is paid; if they consume one saah, the value of one; if two, the value of two is paid.

GEMARA: The rabbis taught: When is it called properly and when not properly bolted? If the gate is bolted so as to withstand an ordinary wind, it is called "properly"; if not, it is called "improperly." Said R. Mani b. Patish: Who is the Tana who holds that slight care is sufficient for a vicious one? It is R. Jehudah of the following Mishna (*supra*, page 104): If his owner secured him with the rope and properly locked him up, and still he came out and did damage, whether he was non-vicious or he was vicious, there is a liability. Such is the dictum of R. Meir. R. Jehudah, however, says: For a non-vicious

there is, but for a vicious one there is no liability; as it is written [Ex. xxi. 36]: "And his owner had *not* kept him in," but here he had. R. Elazar, however, said: "There is no other care for a vicious one than the knife." It can be said that the Mishna is in accordance with R. Meir also, but the tooth and foot are different, for the Scripture required only slight care with them, as R. Elazar, and according to others a Boraitha taught: "There are four things regarding which the Scripture diminished the amount of care, and they are the pit, the fire, the tooth, and the foot: The pit, as it is written [ibid., ibid. 33]: "And if a man open a pit, or if a man dig a pit, and do not cover it"; but if he had only covered it (without placing a layer of earth on it), it is sufficient. Fire, as it is written [ibid. xxii. 5]: "He that *kindled* the fire shall surely make restitution," which signifies that it must be done *purposely*. The tooth and foot, as it is written [ibid., ibid. 4]: "And he *let* his beasts enter, and they fed in another man's field," which signifies an intentional act, but not otherwise. Said Rabba: From our Mishna it is also to be inferred (that the reason is because the Scripture diminished the amount of care), for it states *sheep* instead of *ox* (although sheep require less care), of which it treats throughout. We must say, then, that this is because the Law requires only slight care, and therefore the Mishna mentioned only sheep, which usually do damage only with the tooth and foot, and not with the horn, and also for the reason that the tooth and foot are considered vicious from the beginning, which is not the case with the horn. Infer from all this that slight care only is required.

We have learned in a Boraitha: "R. Jehoshua said: There are four things (for which) one who does them cannot be held responsible before an earthly tribunal, although he will be punished for them by the Divine court, and they are: he who breaks the fence of the stall where his neighbor's cattle are kept (only when the fence was shaky); he who bends his neighbor's growing crop in the direction of fire (only during the prevalence of an unusual wind); he who hires a false witness (only for the benefit of his neighbor); and he who suppresses his own testimony and thereby deprives his neighbor from its benefit (only if he was the sole witness). But if the circumstances are different, he is liable also to an earthly tribunal.

R. Ashi said: The case of bending one's crop in the direction of the fire may be explained that he spread blankets over

the crop, and thereby made it "hidden articles," for which there is no liability for the one who starts the fire (as explained elsewhere).

But are there not other cases in which one is liable only to heavenly justice? Yea, there are, but those just stated had to be enumerated here, for one might say that in these cases there should be no liability even to the Divine court. Thus, in the first case, because it had to be abolished anyhow; in the second, because by an unusual wind it would have caught fire without that and (according to R. Ashi it is also necessary to mention this case, lest one say he may argue that he spread the blankets over it in order to protect it against the fire); in the third, because the witness had not to listen to the one who hired him, as it was prohibited by the Law; and in the last case, because who could guarantee that if he should not have testified the other would have admitted his liability? And lest one say that in such cases there is no liability, even to the Divine court, hence the statement.

"*If he expose them to the sun,*" etc. Said Rabba: And this is so even if they undermined (the fence and did damage); lest one say that in such a case the damage was done through accident, he comes to teach us that even this is considered wilful. Why so? Because the plaintiff may say to the defendant: Did you not know that when exposing them to the sun they would do all they could to break out?

"*If the robbers lead them out,*" etc. Is this not self-evident, for by this act they place them under their own control as regards everything? The case was that they only stood before them on each side (so as to leave only the way leading to the standing crop open). And this is in accordance with Rabba, who said in the name of R. Mathua, quoting Rabh: One who leads another one's animal to, and places it in, one's barn (and it does damage), is liable. "Places?" Is this not self-evident? We must say, then, that it means that he stood before them (as explained above). Said Abayi to R. Joseph: You explained to us the above saying of Rabh, that the case was that he struck it (driving it on), so also was the case here with the robbers, that they did not lead them out, but only struck them with a cane (and this action is considered equivalent to leading them out with the hand).

"*If he deliver them to a shepherd,*" etc. From the fact that it states that he delivered them to a *shepherd*, and it does not

state that "he delivered them to another," it is to be inferred that the shepherd in turn delivered them to his assistant, for such is the custom of a shepherd; but if he delivered them to a layman the shepherd is not liable. Shall we assume that this will be a support to Rabha, who said elsewhere: "A bailee who intrusts his bailment to another bailee is liable?" Nay, perhaps the statement here is because it is customary so to do, but such is the law, even if it was delivered to a layman.

It was taught: A bailee of a lost article, Rabba says that he is considered a gratuitous bailee for he derives no benefit from such bailment; R. Joseph, however, says that because the Scripture imposed this duty upon him, against his will, he is considered a bailee for hire.

R. Joseph objected to Rabba from the following Boraitha: If he returned the lost article in a place where its owner were likely to see it, he is absolved from any obligation to further trouble himself with it; and if it was stolen or lost, he is responsible. Does this not mean if it was stolen or lost while under his control (and still he is liable; hence he is considered a bailee for hire)? Nay, it means from the place to which he returned it. But does it not state that he need not trouble with it any more? He answered him: The case was that he returned it in the noon-time, and it teaches two cases, thus: If he returned it in the morning, when it could be noticed by its owner, who usually passes by that place, he need no more trouble himself with it; if, however, he did so in the noon-time, when the owner does not usually pass by, and it was stolen or lost, he is responsible. He again objected from the following: "He is always liable until he return it to the control of the owner." Does that not mean if even he placed it in his house, hence we see that he is considered a bailee for hire? He answered him: I admit that in case of animated beings more care is required, for they are used to walk away.

Rabba then objected to R. Joseph's statement from a Boraitha which teaches: It is written [Deut. xxii. 1]: "Bring them back." "Bring them" means to the owner's house; "back" means to his garden or to the owner's ruined (vacant) house. We must say, then, that in the last two places the returned property is not guarded; because if it is, then what difference is there between these two places and the house? Now then, if he is considered a bailee for hire, why is he not liable for it at the last two places? And R. Joseph answered: The Boraitha

speaks of a case where the property was guarded, and the difference between those places and the house is that in the former case the owner is not notified, and it comes to teach us that the knowledge of the owner is not required, as R. Elazar states in Baba Metzia, p. 31*a*.

Said Abayi to R. Joseph: Do you yourself not admit that he is considered a gratuitous bailee? Did not R. Hyya b. Aba say in the name of R. Johanan that, regarding found property, if the finder claims that it was stolen from him (and it was found out that it was not so), he pays double (as it is written [Ex. xxii. 7, 8]: "If the thief be not found . . . or for any manner of lost thing"); and if he would be considered a bailee for hire, why should he pay double (by his own claim he admits that he has to pay the value of the bailment)? He answered: The case was that he claimed to have been robbed by armed robbers (*i.e.*, an accident, in which case he is free). He objected again: If so, then it is robbery, and not theft? R. Joseph rejoined: I say that even armed robbery, when committed not publicly, is still considered theft, and he must pay, according to Scripture, double. Abayi objected again: (It was stated elsewhere in regard to the comparison between a gratuitous bailee and a bailee for hire, as follows:) "Nay, a gratuitous bailee pays double and a bailee for hire does not." Now, if armed robbers pay also double, like ordinary thieves, there can also be a case of a bailee for hire who should pay double, as, for instance, when he claims that he was robbed by armed robbers (and it was found out to be not so)? He rejoined: It means thus: Nay, there can be no comparison between a gratuitous bailee who pays double, whatever his claim may be, and a bailee for hire who pays double only when he claims to have been robbed by armed robbers. He still objected from the following Boraitha: It is written [Ex. xxii. 9]: "And it die, or be hurt"; from this we know only as to death or hurt. Wherefrom do we know also as to theft or loss? This is to be drawn by an *a fortiori* conclusion, thus: A bailee for hire who is not liable for death or hurt is still liable for theft or loss, a borrower who is liable for death or hurt ought so much the more to be liable for theft or loss. And this *a fortiori* conclusion is irrefutable. Now, if armed robbers are considered ordinary thieves, why is it irrefutable—can it then not be refuted thus: There is an exception with a bailee for hire who pays double when he claims that he was robbed by armed robbers? He rejoined: The Tana of this

Boraitha holds that even to pay only the actual value without an oath is better than to pay double under oath (and therefore the *a fortiori* conclusion cannot be refuted). (The explanation of this statement will be found in Baba Metzia, where this case is treated at length.)

"*If it fall into a garden,*" etc. Said Rabh: The case was that it struck upon the growing crop, and the benefit derived for which payment must be made is that it was prevented from striking hard upon the ground. But how is the case if it consumed some plants, does it not pay? Shall we say that Rabh is in accordance with his theory (above, page 109) "that the animal ought not to have eaten"? What comparison is this? When did Rabh say this? Only when the animal was injured by the fruit which it consumed and the owner of the animal claims payment for such injuries, in such a case the owner of the fruit can say that the animal ought not to have eaten; but when the animal *did injury to the owner of the fruit* by consuming it, did Rabh then say that it must not be paid? But what, then, did Rabh mean by his statement above? Rabh means to state a case of "not only"; viz., Not only that he pays where it consumed, but even when it fell on the crop and consumed nothing it must pay, for the benefit it derived in being prevented from striking hard upon the ground, and lest the owner of the animal say that this was only his duty, similar to frightening away a lion from his neighbor's field, for which the Law awards no compensation, it comes to teach us that payment must be made for the benefit. But why is this really not to be compared to frightening away a lion from one's neighbor's field? Because in such cases one does not incur any expense, but here he has actual loss.

In what manner did it fall? R. Kahana said that it slipped out by reason of the urine it let. Rabha, however, said that it was pushed in by another animal. According to the latter, so much the more if it happened by reason of her own urine; but according to the former, only in such a case; but when pushed in by another animal it is considered wilful, and the value of the damage is paid, for he (the owner of the field) can say to the owner of the animal: "You should have seen to it that the animals could have passed one by one, without being pushed in." Said R. Kahana: The case is only if it damaged one plant-bed (that it pays the benefit that it derived); but if it went from one plant-bed to another, consuming the plants, it

pays the full value. R. Johanan, however, says that even in such a case, and even if it continued doing so the whole day, only the value of the benefit derived is paid (because when once it was already there it could not keep away from consuming), until the owner has noticed that the animal left the field and then returned again. Said R. Papa: It must not be said that the owner of the animal must have notice of both the leaving and the returning, it is sufficient if he only had notice of the leaving and did not care to keep it from returning, because the owner of the field may say to the owner of the animal: "You should have known that, so long as it knew the way, it would go there at the earliest opportunity, and you should have taken care of it."

"*How does it pay what it damaged,*" etc. Whence is this deduced? Said R. Mathua: It is written [Ex. xxii. 4]: "And they feed in another man's field"—this teaches us that the appraisement is made with the *other* field (which was not damaged). But is this passage not necessary, to exclude public ground? If so, then the Scripture ought to read, "and they feed another man's field." Why *in* another man's field? Hence to infer both.

How is the appraisement made? Said R. Jose b. Hanina: One saah in sixty (*i.e.*, the Mishna means not only sixty times the portion damaged, but thus: To the measure of land sufficient for planting a saah of grain, on which the damage was done, are added fifty-nine measures of such dimensions, and appraisement is then made as to the value of such a lot of land if sold as one lot of land; then the value of a measure sufficient for the planting of one saah is apportioned, and then is ascertained the difference in price of such saah on account of such damage. The reason is, that no undue advantage should be taken of the defendant; for a small plot of land is comparatively higher in price than a plot of sixty times its size, because a poor man can also afford to buy it and there are more purchasers). R. Janai, however, says: One Tirkav in sixty (thirty saah, and not sixty saah, in order not to take undue advantage of the plaintiff, as for plots of sixty saah buyers are not so numerous, because for a man of moderate means it is too much and for a rich man it is too small a plot). But Hezkiah says: The appraisement is made only by one in sixty times the quantity damaged. An objection was raised from the following: "If she consumed a kabh or two, one must not say that their

value must be paid, but it is assumed as if it were a small plant-bed and is thus appraised." Is it not to be presumed that this plant-bed is appraised separately and for itself? Nay, it means in sixty times its size.

The rabbis taught: "The appraisement is not one kabh in sixty kabh, for it increases its value; neither one kur in sixty kurs, for it unreasonably reduces its value." What does this mean? Said R. Huna b. Menoa'h in the name of R. Aha the son of R. Ika, it means thus: A measure of a kabh is not appraised separately, for the plaintiff may unduly benefit by it; nor a kabh as relative to a kur, for the plaintiff may unduly be injured by it (for the damage may not be so well noticed), but every unit is appraised at sixty times its value (for the reason stated above).

It happened that one came before the Exilarch and complained of one who destroyed one of his trees. Said the Exilarch to the defendant: "I know of my own knowledge that the tree was one of a group of three trees which was worth one hundred zuz. You will therefore pay him one-third of this amount." The complainant refused to accept this decision, saying: Before the Exilarch, who applies the Persian law, what have I to do? and he went before R. Na'hman, who assessed the damage by appraising the destroyed tree as relative to a group of sixty trees. Said Rabha to him: The rule of sixty was held when damage was done by one's *property* (without the intention of its owner), and you wish to apply the same rule to this case, where the person himself has done the damage intentionally? Said Abayi to Rabha: Why do you think that in case of damage done by one's own person this rule should not apply, because "sixty" is not mentioned in the following Boraitha: "One who destroys the young grapes of his neighbor's vineyard, the damage is assessed by appraising the value of the vineyard before and after the destruction"? But have we not learned in another Boraitha, similar to this as regards damage by one's property, viz.: If the animal destroyed a bough, R. Jose said, the assessors of fines in Jerusalem say that a bough one year old is worth two silver dinars; two years old—four. If it consumed hay, R. Jose the Galilean says that the damage is assessed by appraising the value of what remained. The sages, however, hold that the value of the land before and after the consumption of the hay is appraised (and the difference in value is the damage). If it consumed grapes in the budding stage,

R. Jehoshua says that they are considered as if ready to be plucked, the rabbis, however, apply the former rule. R. Simeon b. Jehudah says in the name of R. Simeon: This was said only when the grapes or figs were still in sprouts; but if they were already developed to the size of a white bean, they are considered as ready to be plucked? Now then, as to the sages, although they do not mention the rule of sixty, still we know from elsewhere that such is their theory, and therefore it does not state it here expressly. Interpret the above Boraitha in the same manner. The Master said: R. Simeon b. Jehudah said, etc. This was said only when the grapes and figs were still in sprouts, from which it is to be inferred that if they were in the budding stage they are considered as ready to be plucked. How should the latter part be explained: "If it consumed figs or grapes when already of the size of a white bean, they are considered as ready to be plucked"—from which it is to be inferred that if in the budding stage it is appraised as to how much it was worth before and how much after? Said Rabhina: Add, and teach together thus: "This is in a case where it consumed grapes and figs in the sprouting stage; but if in the budding stage or when they were already of the size of a white bean, they are considered as ready to be plucked." If this is so, is it not the same as what R. Jehoshua said? The difference is as to the deduction from the amount of damage of the value of the increased sap (of the tree by reason of the destroyed fruit, which benefits the remaining fruit). But it is not known who is the one who holds him liable. Abayi, however, says: It is very well known, because the Tana who takes into consideration the increase of sap is R. Simeon b. Jehudah, who holds something similar in Khethuboth, p. 39*a*.

R. Papa and R. Huna the son of R. Jehoshua used to appraise the tree together with a small portion of the ground on which it was growing. The Halakha, however, prevails in accordance with R. Papa and R. Huna the son of R. Jehoshua as regards Aramean trees and in accordance with the Exilarch as regards Persian trees (because they are expensive).

Eliezer the Little once put on black shoes and stood in the market-place of Nahardea. When the officers of the Exilarch asked him for the reason, he answered that it was because he was lamenting the fall of Jerusalem.

They said to him: "Are you such a great man as to be worthy of lamenting the fall of Jerusalem?" And thinking

that he was doing that in search of notoriety, they placed him under arrest. He, however, protested and said: "I am a great man." When asked to prove it, he said: "Either you ask me some difficult question, or I will ask one of you." They said to him: "You ask the question." He asked thus: "One who destroys a young date-tree (on which the dates are not yet ripe), what amount of damages must he pay?" They answered: "He pays the value of the tree." "But there are already dates on it?" They rejoined: "Then let him also pay the value of the dates." "But did he, then, take the dates with him; he only destroyed the tree?" he argued. "Well, let us then hear what you have to say to that." He answered: "The damage is appraised as to one in sixty." They said to him: "But who agrees with you in that?" He answered: "Samuel is still alive and his college is in full bloom." When they inquired of Samuel and verified that he agreed with him, they liberated him.

"*R. Simeon says: If it consumed ripe fruit,*" etc. Why so? Was it not said above that [Ex. xxii. 4] "And they feed in another man's field" teaches that it should be appraised together with the ground? This is so only when the ground is needed, but in this case (*ripe* fruit), where they no longer need the ground, it must be appraised separately and paid in full. Said R. Huna b. Hyya in the name of R. Jeremiah b. Aba: There was a case, and Rabh acted in accordance with R. Meir; but in his lectures, however, he declared that the Halakha prevails in accordance with R. Simeon b. Gamaliel. He acted in accordance with R. Meir of the following Boraitha: If he (the husband) transferred some of his estates to one, and his wife did not sign the release of her dower (the amount stated in her marriage contract), and then he transferred other estates to another and she did sign, she lost her dower. Such is the dictum of R. Meir. (And she cannot say: I did this favor to my husband and signed the release as to the second estates because I lose nothing thereby, as I take my dower in the first estates, from which I have not released my right.) And he lectured that the Halakha prevails in accordance with R. Simeon b. Gamaliel of our Mishna, that if the fruit was ripe it must be appraised separately.*

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* No commentary explains for what purpose this statement is made here and what the marriage contract has to do with the appraisement of fruit, or why R. Huna finds it necessary to declare that there is a contradiction in Rabh's decision between his action in practice and the above lecture. It seems to us that this is to be explained

MISHNA *II.*: One who puts up a stack of grain on another's land without permission, and the land-owner's animal consumed some of the grain, he is free. If the animal was injured thereby, the one who put up the stack is liable. If, however, it was done with permission, the land-owner is liable.

GEMARA: Said R. Papa: It treats here of a case where there was a watchman who told him, "Go and put up your stack," which is construed to mean, "Go, put up your stack, and I will take care of it."

MISHNA *III.*: One who started a fire through the medium of a deaf-mute, idiot, or minor, he is free from responsibility to an earthly tribunal, but he is liable to the Divine court. If, however, he started the fire through the medium of a sound person, the latter is liable. If one brought fire and the other wood, he that brought the wood is liable. But if the wood was brought first by one, and subsequently another brought the fire, he who brought the fire is liable. If one came and blew at the fire and kindled it, the one who did so is liable. If, however, it was kindled by the wind, all are free.

GEMARA: Said Resh Lakish in the name of Hezkiah: He is not liable to earthly tribunals only if he delivered to the persons mentioned in the Mishna a burning coal and they blew at it; but if he handed them a flame, he who handed it to them is liable. Why so? Because it is his own act that caused the fire. R. Johanan, however, says that even in such a case he is free. Why so? Because it was the deaf-mute's tongs (medium) that caused it. And the court cannot hold him liable unless he handed them both fire and fuel, for in such a case surely his intention was to cause it.

"*If the wind kindled it, all are free.*" The rabbis taught: "If he was blowing at the fire and so also was at the same time the wind—if his blowing, independently of the wind, was sufficient to kindle the fire he is liable; if not, he is free. Why so—let it be as if he was winnowing and the wind helped him, in

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thus: The opposition to R. Simeon b. Gamaliel in our Mishna is anonymous, and there is a rule that the author of all the anonymous Mishnas is R. Meir; and R. Meir's decree regarding the marriage contract agrees with the decision in our Mishna, as his theory as regards the marriage contract is that, although the two estates are separate, still they are considered one, because they belong to one owner; and according to this theory, although the fruit is ripe and no more needs the ground, it can nevertheless not be appraised separate from the ground, because they belong to one owner, and the verse quoted applies. Hence the contradiction. The statement of R. Huna is the only one of its kind in the whole Talmud.

which case he is liable? Said R. Ashi: This was said only as regards Sabbath, where the Scripture requires intentional work (and of course he is satisfied with the help afforded him by the wind and thus it is intentional); but here he is the mere cause (*germon*), and there is no liability as regards damages for being a mere *germon*.

MISHNA *IV.*: If one start a fire and it consume wood, stones, or earth, he is liable; for it is written [Ex. xxii. 5]: "If a fire break out, and meet with thorns, so that stacks of corn, or the standing corn of the field, be consumed thereby, he that kindled the fire shall surely make restitution."

GEMARA: Said Rabha: All those various things were necessary to be enumerated in the Scripture, for one could not be deduced from the other by comparison. Thus, if it mentioned thorns only, it could be assumed that only in such a case there is a liability, because they are destined to be burnt and one does not take proper care, and therefore it is considered gross negligence; but in case of stacks, which are not so and usually one takes proper care of them, it would be considered an accident, for which there is no liability; again, if it mentioned stacks only, it could be assumed that there is a liability, because the damage is great; but in case of thorns, where the damage is little, one might say that there is no liability. But for what purpose is "standing corn" mentioned? To teach that as standing corn is exposed to view, so everything is exposed to view (to exclude that which was concealed from view). [But according to R. Jehudah, who holds that there is a liability also for such things, what does the case just mentioned teach? It comes to include all that is in a standing position, as trees and animals.] "Field"—to include the case where the fire singed the surface of fallow ground or of stones. But let the Scripture mention only "field," and it would include all the others? If so, one might say that it applies only to the *products* of the field (but not to the ground itself), hence it teaches us that (by stating "standing corn" expressly and "field," to include the ground itself).

R. Simeon b. Na'hmani said in the name of R. Johanan: No chastisement comes upon the world unless there are wicked ones in existence, as it is written [ibid., ibid.]: "If a fire break out and meet with thorns." When does a fire break out—when there are *thorns* prepared for it? Its first victims, however, are the upright, as it is written [ibid., ibid.]: "So that stacks of

corn *be* consumed"—not it *shall* consume, to signify that the stacks of corn (the upright) are consumed *first*.

R. Joseph taught: It is written [Ex. xii. 22]: "And none of you shall go out from the door of his house until the morning?" Infer from this that as soon as permission is given to the executioner he makes no distinction between upright and wicked; and furthermore, he picks out his first victims from among the upright, as it is written [Ezek. xxi. 8]: "And I will cut off from thee the righteous *and* the wicked." R. Joseph cried, saying: If they are liable to so much misfortune, what good is there in being upright? Said Abayi: It is of great good to them, as it is written [Isa. lvii. 1]: "*Before* the evil the righteous is taken away" (*i.e.*, that he shall not see the evil that will come in the future).

The rabbis taught: When pestilence is raging in town, stay in-doors, as it is written [Ex. xii. 22]: "And none of you shall go out from the door of his house until the morning"; and it is also written [Isa. xxvi. 20]: "Go, my people, enter thou into thy chambers, and shut thy door behind thee"; and again it is written [Deut. xxxii. 25]: "Without shall the sword destroy, and terror within the chambers." Why the citation of the two additional passages? Lest one say that it is so only as to night-time but not as to day-time, hence the passage in Isaiah, which means at any time; and lest one say that this is so only where there is no terror within the house, but when there is it could be assumed that it were more advisable to go out and associate with others, hence the last-quoted verse in Deuteronomy, to teach that although within the house terror reigns, yet without it is still worse, as "without the sword shall destroy." Rabha in times of fury used to keep the windows shut, for it is written [Jer. ix. 20]: "For death is come up through our *windows*."

The rabbis taught: If there is a famine in town, do not spare your feet and leave town, as it is written [Gen. xii. 10]: "And there arose a famine in the land: and Abram *went down* into Egypt to sojourn there." And it is also written [II Kings, vii. 4]: "If we say, We will enter into the city, then is the famine in the city; and we shall die there." For what purpose is the quotation of the additional passage? Lest one say that it is so only where there is no risk of life, but where there is it is not so, hence the quotation, which is followed by [ibid., ibid.]: "If they let us live, we shall live; and if they kill us, we shall but die."

The rabbis taught again: "When there is a pestilence in town, a person shall not walk in the middle of the road; for so long as the Angel of Death has received his permission to rage, he does so high-handed. On the contrary, when peace reigns, one must not walk on the sideways; for so long as he has not the permission, he hides himself away."

R. Ami and R. Assi were sitting before R. Itz'hak Nap'ha. One was asking him to say some Halakha, and the other to say some Agadah. When he began to say a Halakha he was interrupted by one, and when an Agadah he was interrupted by the other. He then said: I will tell you a parable: It is like unto a man who has two wives—an old one and a young one. The young one picks his gray hair and the old one his black hair. The result is that he becomes bald-headed. I will tell you, however, now something which will be to the satisfaction of both of you: (*Agadah*)—It is written [Ex. xxii. 5]: "If a fire *break* out and meet with thorns"—that means, if it should break out of *itself*—" he that kindled the fire shall surely make restitution." Said the Holy One, blessed be He, "I shall surely make restitution for the fire I kindled in Zion," as it is written [Lam. iv. 11]: "He kindled a fire in Zion, which had devoured her foundations"; and, "I shall also build it up again by fire," as it is written [Zech. ii. 9]: "But I—I will be unto her . . . a wall of fire round about, and for glory will I be in the midst of her." (*Halakha*)—Why does the verse begin with the damage by one's property (if a fire break out) and end with damages done by one's person (*he* that kindled the fire)? To teach thee that one is liable for his fire on the same principle as liability for one's arrow.

MISHNA *V.*: If the fire passed over a fence four ells high, or through a public highway or a river, there is no liability.

GEMARA: But have we not learned in a Boraitha, as regards a fence of such height, that there *is* a liability? Said R. Papa: The Tana of our Mishna counts regressively, viz.: For six, five, and down to (and including) four ells there is no liability; while the Tana of the Boraitha counts progressively, viz.: For two, three, up to (but not including) four, there is a liability. (Hence for four ells, according to both, there is no liability.) Said Rabha: The rule that for four ells there is no liability applies also to a field filled with thorns (which makes it very inflammable). Said R. Papa: The four ells begin to count from the edge of the thorns upwards.

Rabh said: Our Mishna treats of a case where the fire was rising upwards, but if it was creeping (and consuming whatever was in its way, and therefore if it even crossed a public highway, there is a liability) there is a liability even up to a hundred ells. Samuel, however, says the reverse: Our Mishna treats where the fire was creeping; but if it was rising upwards, any dimensions are sufficient to relieve from liability. The following Boraitha is in support of Rabh: This (that if it crossed a public highway there is no liability) was said only if the fire was rising; but if it was creeping and fuel was within reach, even a hundred miles, there is a liability. If it crossed a river or a pool eighteen ells wide, there is no liability.

"*A public highway.*" Who is the Tana who holds so? Said Rabha: It is R. Eliezer, who says in the following Boraitha: If it was sixteen ells, as wide as a public highway, there is no liability.

"*Or a river.*" Rabh said: It means a full-sized river. Samuel, however, said: It means a lake (from which the neighboring fields are irrigated). According to Rabh, it is so even if the river dried up (for so that it be wide enough, it is considered as a public highway), but according to Samuel there must be water in the lake.

MISHNA *VI.*: If one start a fire on his own premises, how far must the fire pass (in order to subject him to liability)? R. Eliezer b. Azariah said: It is looked upon as if it were in the centre of a space of land sufficient for planting a kur of grain (and if it pass out of such distance, he is liable). R. Eliezer says: Over sixteen ells, as wide as a public highway. R. Aqiba says: Over fifty ells. R. Simeon, however, says: It is written [Ex. xxii. 5]: "He that kindled the fire shall surely make restitution"—that means that he must make restitution for all that was burnt through the fire he started.

GEMARA: Does, then, R. Simeon not hold of distances in regard to fire? (*i.e.*, that a fire must not be built unless it is a certain distance from other objects). Have we not learned in the following Mishna (Baba Bathra, Ch. II., M. 2): R. Simeon says: These distances were said only for the purpose that if they were observed, and still damage was done, there is no liability (hence we see that he holds of distances?). Said R. Na'hman in the name of Rabba b. Abuah: R. Simeon's statement in the Mishna, that one must pay for what was burnt through his fire means that the fire was made by the one who started it of such height.

that it could pass the different distances stated, respectively. R. Joseph in the name of R. Jehudah, quoting Samuel, said: The Halakha prevails in accordance with R. Simeon, and so also said R. Na'hman in the name of the same authority.

MISHNA *VII.*: If one cause his neighbor's stack of grain to burn down, and there be vessels therein which also are burnt, R. Jehudah says that he must pay also for the vessels. The rabbis, however, hold that he pays only for a stack of wheat or barley, as the case may be, of such dimensions. If a bound kid were therein and a slave was standing near by and both were burnt, he must pay for the kid (but not for the slave, as he should have escaped); if, however, a bound slave were therein and a kid was standing near by and both were burnt, he is free (from damages, because he is guilty of murder). And the sages concede to R. Jehudah that, if one set fire to another's house (or palace), he pays for all that was therein contained, for it is customary with people to keep their property in the house.

GEMARA: R. Kahana said: The rabbis and R. Jehudah differ only in case he started the fire on his own and it communicated to another's premises, in which case R. Jehudah holds one liable for the damage done by fire to concealed articles, and the rabbis do not, but if he started the fire on another's premises, they all agree that he pays for all that was contained therein. Said Rabha to him: If so, why does the Mishna state further on that "the rabbis concede," etc.—let it distinguish in that very statement, and say that the case is so only if he started the fire on his own premises, but if on another's they all agree that he must pay for all that was contained therein? Therefore said Rabha: They differ in both; viz., if he started the fire on his own premises and it communicated to another's. R. Jehudah holds him liable for concealed articles and the rabbis hold him free; and also in the other case, R. Jehudah holds that he must pay for all that was concealed therein, even if it were *αρναχις* (a belt made with pockets to place money therein). The rabbis, however, hold that he is liable only for such articles as are usually kept there, as a threshing-board or an ox-bow, but not for such articles as it is not customary to keep there.

The rabbis taught: If one cause a stack of grain belonging to another to burn down, and there be vessels therein which also are burnt, R. Jehudah says that he pays for all that was contained therein. The rabbis, however, hold that he pays only for a stack of wheat or barley, and the vessels are considered as

if their space was occupied with grain. This is so only when he started the fire on his own premises and it communicated to another's; but if he started it originally on another's premises, he pays for all that was therein. And R. Jehudah concedes to the rabbis that, if one permit his neighbor to place a stack of grain on his premises and the other did so and concealed some articles therein (and the owner of the premises cause a fire to burn them) he pays only for the grain; if he permitted him a stack of wheat and he placed there a stack of barley, or *vice versa*, or of wheat and he covered it with barley, or of barley and he covered it with wheat, that he pays only the value of barley.

Rabha said: If one give a golden dinar to a woman and say to her: "Take care of it, for it is a silver dinar," and she damage it, she pays for a golden dinar; for he may say to her: "What right had you to damage it?" If, however, it was lost because of her negligence, she pays only for a silver dinar; for she can say to him: "I obliged myself to take care of a silver dinar only, but not of a golden one." Said R. Mordecai to R. Ashi: Ye learned this in the name of Rabha, while we derived it from the above Boraitha, which states that, if one allowed him to place a stack of wheat and he covered it with barley, or *vice versa*, he pays only the value of barley; hence we see that he may say to him that he obliged himself to take care of barley only. So also here. She may say, "I obliged myself to take care of a silver dinar, but not of a golden dinar." Rabh said: I heard something in regard to R. Jehudah of our Mishna, and I cannot recollect what it was. Said Samuel: Does (Aba) not recollect what was said in regard to R. Jehudah's theory that one is liable for concealed articles? That he must make oath as to the value, as enacted in case of a bailee who claims that he was robbed.

It happened that one kicked the money-pouch of his neighbor into the river. The owner came and claimed that such and such articles were therein. When it came before R. Ashi, he was deliberating as to what was the law in such cases. Said Rabhina to R. A'ha the son of Rabha, according to others R. A'ha the son of Rabha to R. Ashi: Is this not stated in our Mishna: "And the sages concede to R. Jehudah that if one," etc., "because it is customary with people," etc.? He answered: If he had claimed that he had money therein it would be so, but here he claims that he had therein pearls; and the

question is, is it customary with people to keep pearls in a money-pouch? This remains unanswered.

Said R. Jemar to R. Ashi: If one claimed that he kept a silver cup in his house, what is the law? He answered: It must be investigated whether he is a man of such standing that he has silver cups, or whether he is a person whom others trust and deposit with him such article. Then he makes oath, and he is paid; if not, he is not believed, and no oath is given him.

R. Ada the son of R. Avia questioned R. Ashi: What difference is there between a robber and one who uses violence? He answered: He who uses violence pays the value (to the owner who gives up the articles under duress) while a robber does not. He rejoined: If he pays the value, why is it called violence—has not R. Huna said: If even one were threatened with hanging in order to compel him to sell his property, the sale is valid? This presents no difficulty. R. Huna said so only when he finally consented, and said plainly, "I am willing to sell it"; but if he never voluntarily consented it is considered violence, even if the value of the article was received by him.

MISHNA *VIII.*: If a spark escape from under the blacksmith's hammer and do damage, there is a liability. A camel that was walking on a public highway laden with flax, and the flax pressed into a store and caught fire from the storekeeper's lit candle and set fire to the house, the driver of the camel is liable. If, however, the candle was placed outside the store, the store-keeper is liable. R. Jehudah says: If it was a Hanuka lamp, there is no liability.

GEMARA: Said Rabhina in the name of Rabha: From the statement of R. Jehudah it is to be inferred that there is a merit in placing the Hanuka lamp within ten spans (above the ground); for if it should be assumed to be above ten, why should R. Jehudah say that there is no liability—let him say that the store-keeper should have placed it above the camel and its rider? Hence as stated: Nay, it may be said that it might be placed even above them; but as an answer to the claim that he should have placed it above the camel and its rider, he may say that when one is occupied in the performance of a merit the rabbis do not put him to so much trouble.

CHAPTER VII.

RULES AND REGULATIONS CONCERNING THE PAYMENT OF DOUBLE, AND FOUR AND FIVE COLLUSIVE WITNESSES; THE RAISING OF YOUNG CATTLE IN PALESTINE, ETC.

MISHNA *I.*: The payment of double (in cases of larceny) is more rigorous than the payment of four and five fold; for the former is applicable to animate as well as to inanimate beings, while the latter is applicable to an ox and a sheep alone, as it is written [Ex. xxi. 37]: "If a man steal an ox or a sheep, and kill it or sell it," etc.

The one who steals a stolen article from a thief does not pay double, neither does he pay four or five fold if he afterward slaughtered or sold it.

GEMARA: It does not state that the payment of double is applicable to a thief as well as to one who claims that the bailment was stolen from him, and the payment of four and five fold is applicable to a thief only. Shall we assume from this that this is a support to R. Hyya b. Aba, who said in the name of R. Johanan: One who avails himself, as regards a bailment, of the claim that it was stolen from him, pays double; if he slaughtered or sold it, he pays four and five fold? Does, then, the Mishna state, "there is no difference," etc., "and *only* in this case," etc.? It states only "is more rigorous" and mentioned only one, and did not care to enumerate all.

"*For the payment of four,*" etc. Whence is this deduced? From the following Boraitha: The rabbis taught: It is written [Ex. xxii. 6]: "For all manner of trespass"—this is a *general term;* "for ox, for ass, for lamb, for raiment"—this is a *particular term;* "or for any manner of lost thing"—which is again a *general term.* It is, then, a general, particular, and again a general term, in which case it is construed to be limited to the particular term; and as the particular term states expressly a movable subject, the substance of which is counted as money (a value is put on it), so also the others mean only movable subjects the substances of which are counted as money,

excluding land, which is not movable; slaves, who are likened to land; also documents, which, although movable, their substance is not counted for money; as well as consecrated articles, because the Scripture reads " his *neighbor's.*" (The further discussion which follows here belongs to Mishna VI., Chapter IX. of this volume, and is to be found there.)

R. Ilaa said: If he stole a lamb and while in his possession it grew into a ram, or a calf and it grew into an ox, this is considered a (material) change while in his possession and he acquires title to it; and if he subsequently slaughtered or sold it, it is considered his own (and he is not liable to the payment of four and five fold). R. Hanina objected to him from the following: If he stole a lamb and it grew into a ram, or a calf and it grew into an ox, he is still liable to the payment of double, and four and five fold, and the payment may be made in such cattle as they were at the time when the theft was committed. Now, if he acquired title by the change, why should he pay—did he not slaughter or sell his own ? He answered: But what is your opinion—that the change does not acquire title ? why should he pay as at the time the theft was committed—why not their present value ? He answered: Because he may say: " Did I then steal of you an ox ? I stole of you a calf!" He rejoined: May the Merciful save us from such opinions! He retorted: On the contrary, may the Merciful save us from such opinions as yours.

R. Zera opposed: Let title be acquired (if not by the change in the body of the stolen subject) by the change in its name ? Said Rabha: There was no change of name, for a calf one day old is already called " ox," as it is written [Lev. xxii. 27]: " When an *ox* or a sheep or a goat is *born,*" etc., and so also a ram, as it is written [Gen. xxxi. 38]: " And the rams of thy flock have I not eaten." Did Jacob then mean to say that only rams he did not eat, but lambs he did ? Infer from this that a lamb one day old is already termed *ram.* But, in any event, is this not an objection to R. Ilaa ? Said R. Shesheth: The above Boraitha is in accordance with the school of Shammai, who hold that the change does not affect the title of the owner, as we have learned in the following Boraitha: If one give to a harlot as her hire wheat and she grind it into fine flour, or olives and she press them into oil, or grapes and she press them into wine—one Boraitha teaches that it is prohibited (to be used for an offering under Deut. xxiii. 19), and another Boraitha teaches

that it is permitted; and R. Joseph said that Gorion of Asphark explained the above, that those who prohibited their use are of the school of Shammai and those who permitted their use are of the school of Hillel. What is the reason of the Beth Shammai? Because it is written [ibid., ibid.]: "For *both* (גם) of them," which means to include also their changed forms; and the Beth Hillel are not very particular about the word "both," and hold that it means only their original but not their changed form.

Now, let us see: The point of difference (between R. Ilaa and R. Hanina) is that one holds that the change does, while the other holds that it does not acquire title; but as to the payment, both agree that the original value must be paid, as further on the Boraitha teaches: He pays double, four or five fold, as at the time the theft was committed. Shall we assume that from this there is an objection to Rabh, who said above that where the principal only is paid the original value at the time the theft was committed is paid, but double, four and five fold, is paid as at the time of the *trial?* Said Rabha: If he makes restitution in specie, he returns lambs; but if he pays money, he pays their present value.

Rabba said: That a change acquires title is both written and taught: *Written* [Lev. v. 23]: "And he shall restore the robbed article* that he hath taken violently away." Why did the Scripture mention "that he hath taken violently away"? (is it not understood from the words "*robbed* article"?)—to teach that if it is still in the same state as at the time it was stolen it must be returned in specie; if not, money only shall be paid. *Taught:* if one robbed wood and made it into vessels, wool and made it into garments, he pays as at the time of the theft. "If he had not succeeded in giving it to him (to the priest, the first shorn wool) until he died he is free." Hence we see that change acquires title.

Resignation of hope (when an article was robbed or lost and its owner resigned his hope to regain it), the rabbis said that it does acquire title for the robber. But we do not know whether they mean that it is so biblically, or rabbinically only. It may be said that it is biblically, because it may be equal to one who found an article of which its owner resigned his hope to regain it immediately after it was lost and before it reached the hands of the finder; and the same can be said of the robber that, when

* Leeser does not translate this word literally.

the robbed one resigned his hope of regaining it immediately after he was robbed, the robber subsequently acquired title. On the other hand, it cannot be equalled to a lost article, for when it reached the finder he took it permissively, while the robber, when he took the article, committed a sin. Therefore biblically he never acquired title; but rabbinically it was enacted that he should acquire title for the benefit of those who might wish to repent (that they might be able to return its value). R. Joseph, however, says that resignation of hope does not acquire title even rabbinically (and the stolen article must be returned in specie), and he objected to Rabba from the following: If he stole leaven and kept it over Passover, he may say to the owner, "Yours is before you as it was" (although the owner can no more derive benefit from it, still the damage is not visible). Now, in this case it is certain that the owner has resigned his hope of regaining it, as it is of no value at all for him even if returned; and if this acquires title, why may he say to him, "Yours is before you"—did not the thief acquire title as soon as hope was resigned? And if he desires to repent, he ought to pay the full value in money? He answered: What I mean is, in a case where the one resigned his hope and the other desired to acquire title to it; but in your case, although the owner resigned his hope, the thief did not want to acquire title, as also to him it was of no value.

Rabha said: The discussion whether change in name or action, or resignation of hope, does or does not acquire title remained unexplained for twenty-two years, until R. Joseph became the president of the college, and explained that the change of name is equivalent to change in act, which surely acquires title, as the reason for both is the same. For instance, change in act—if he made vessels out of stolen wood, there is no more wood, but vessels, and at the same time the name was also changed; consequently the acquisition of title comes from both the change in act and in name. The same theory can apply to a thing where the change in act was slight, scarcely noticed; as, for instance, if he trimmed a hide into a horse-blanket, in which case the principal thing is the change in name; for before it was known as a hide, while now it is known as a horse-blanket, and title is acquired.

But is there not a case of a robbed beam which was built into a house—a case very similar to the above, and in which the principal change was in name; because before it was known as

beam and after as a roof, and nevertheless, if not for the rabbinical enactment for the benefit of those who might wish to repent, biblically he had to take apart the building and return the beam in specie? Answered R. Joseph: In this case there was no change in name, as it was called a beam even after being built into the house (as all the beams together are called a roof, but each one separately still retains the name beam; and we so find it in a Boraitha elsewhere).

R. Zera says: Even if the beam in question does no more retain its original name when built into the roof, it would still not be considered a change; for as soon as the building is taken apart the original name "beam" is used again, while in the case of the hide, as soon as it was changed into a horse-blanket, it will never be called "hide" again.

R. Hisda in the name of R. Jonathan said: Whence is it deduced that a change does not acquire title? It is written [Lev. v. 23]: "And he shall return the stolen article," which means in specie under all circumstances. But is it not also written "that he hath taken violently away" (which may be explained to include the value thereof)? This verse is needed to deduce from it that he pays an additional fifth part for his own theft, but not for that of his father (as will be explained in Chapter IX.).

Ula said: Whence is it deduced that resignation of hope to regain property does not acquire title? It is written [Mal. i. 13]: "And ye brought what was robbed, and the lame, and the sick"—that means that "what was robbed" is equal to the lame in this respect, that as the lame cannot be remedied neither can robbery, no matter whether before or after resignation of hope. Rabha deduced this from the expression [Lev. i. 3] "*his* offering," which means but not what was robbed. If before resignation of hope, it is self-evident—why, then, the verse? We must therefore say that it means even after resignation. Infer from this that resignation of hope does not acquire title.

"*And the payment of four*," etc. Why so? Let it be deduced by an analogy of expression of the word "ox" mentioned here and "ox" mentioned in regard to observation of Sabbath; as there "ox" includes beasts and birds, so also here? Said Rabha: The verse says here [Ex. xxi. 37]: "An ox or a sheep" twice, to teach it of only those two, but no others.

"*The one who steals*," etc. Rabh said: This was taught only before resignation of hope; but if after that the first thief

acquired title, and the second thief must pay him double. Said R. Shesheth: "I would say that Rabh said this while he was napping, for we have learned: R. Aqiba said: Why did the Scripture say that if he slaughtered and sold it he must pay four and five fold? Because the sin was deeply rooted in him (and he acquired title to it by his acts). Now, let us see. When? If before resignation, what deep-rooting is there? (he has not acquired title and his acts helped nothing, as no one holds that title is acquired before resignation of hope). We must therefore say that it was after resignation. Now then, if resignation acquires title, why should he pay four and five fold —did he not kill or sell his own? It may be explained as Rabha said (that he must pay four and five fold even before resignation of hope, and the reason is) because he repeated his sin.

(An objection was raised.) Come and hear: It is written [Ex. xxi. 37]: "And kill it, or sell it"; as if killed it can no more return to life, so also in case of sale it must be such that it should not return again. When? If before resignation, it does return? We must therefore say that it relates to after resignation. Now, if resignation acquires title, why should he pay four and five fold—was it not his own when he slaughtered or sold it? It is as R. Na'hman said elsewhere, that even before resignation of hope, if the thief hired it out to a third party for thirty days, although the thief had no title to it, still his act of hiring was valid. So also can our case be explained.

It was taught: One who sells before resignation of hope to regain it, R. Na'hman says that he is liable to pay four fold because he sold it; and the Scripture holds him liable to pay whether before or after resignation. R. Shesheth says that he is free, because it cannot be called sale when the sale is invalid; and therefore his acts were of no effect, and the liability is only where his acts are of effect, as in case of slaughtering. So also was R. Elazar's opinion, that it means after resignation of hope. As R. Elazar said: It must be declared that resignation of hope to regain stolen property comes generally immediately after the occurrence of the theft (and if the thief sold it, his act is valid, because there were both resignation of hope and change of control); and this theory is supported by the Scripture, which holds the thief liable to the payment of four and five fold without fear that the owner might have not resigned his hope; and this is only because generally hope is resigned immediately after the occurrence of the theft. But perhaps the Scripture means even

before resignation of hope ? This would not be correct, for sale and slaughtering are written together; and as in case of slaughtering his acts are accomplished and cannot be undone, so also in case of sale. But perhaps this is so when we know for certain that he has resigned his hope ? This also would not be correct, for the same reason that sale and slaughtering are written together; and as in case of slaughtering there is no difference whether before or after resignation of hope, so also is the case with sale. Said R. Johanan to him: The case of kidnapping [Ex. xxi. 16], in which there is surely no resignation of hope, for no one gives up hope in such cases, and still the Scripture makes him guilty, can prove that the Scripture does not require any resignation of hope. [From this we see that R. Johanan holds that he is liable before resignation of hope.] But what is the law after resignation of hope ? (Does he agree with Rabh's opinion stated above ?) Nay, he holds him liable whether before or after resignation of hope. Resh Lakish, however, holds him liable only before resignation of hope but not after that; for after resignation he acquired title, and if he killed or sold it he did so to his own.

R. Johanan said: A stolen thing of which the owners have not resigned hope to regain it cannot be consecrated. By the owner thereof, because it is not under his control; and by the thief, because he has no title thereto. Did, indeed, R. Johanan say so ? did not R. Johanan say that the Halakha always prevails according to an anonymous Mishna, and there is a Mishna [Second Tithe, Chap. V., M. 1]: A vineyard in the fourth year of its planting (the fruit of which must first be redeemed before using it) used to be marked with clods (of earth), and this was a sign that benefit might be derived from it after being redeemed, as benefit may be derived from earth. In the third year of its planting, however, in which the fruit must be destroyed without deriving any benefit at all from it, it used to be marked with fragments of broken clay vessels, for a sign that as from such fragments no benefit can be had, so also none must be had from the fruit. Graves used to be marked with limestone (to warn passers-by not to step on them lest they become unclean), which is white, for a sign that therein were interred (human) bones, which are also white; and the limestone was dissolved and spread upon the graves, to be more visible. R. Simeon b. Gamaliel, however, said that the vineyards used to be marked in the Sabbatical year only, because the fruit was

considered ownerless, and therefore warning had to be given not to use it (because of the third and fourth years); but in other years, when the fruit must not be used without the permission of the owner, it was not marked, but, on the contrary, let the wicked thief eat of it, and suffer the consequences.

The pious man, however, used to place money in the vineyard, declaring: "All that is plucked and gathered of this fruit shall be redeemed by this money." (Hence we see that although not under his control, still it is redeemed—how, then, can R. Johanan say that neither can consecrate a stolen thing?) But lest one say that the above statement regarding the pious one is not anonymous, but is the continuation of the statement of R. Simeon b. Gamaliel (even then R. Johanan would contradict himself), as Rabba bar bar Hana said in his name, that wherever the teachings of R. Simeon b. Gamaliel are mentioned in our Mishnayoth the Halakha prevails according to him, except in three cases? (which are enumerated in Sanhedrin), it may be said: Do not read, "The pious man used to place money in the vineyard, declaring, 'All that was plucked,' etc., but read, 'All that *will* be plucked,' etc. (*i.e.*, that the money was placed when the fruit was still attached to the trees, and as in the Sabbatical year all fruit is ownerless, the one who plucks and gathers it becomes its owner and at the same time the money placed there redeems it)." But, after all, could, then, R. Johanan say so—did he not say elsewhere that the declaration of the pious ones and of R. Dosa were of one and the same theory, and in the declaration of R. Dosa it is plainly stated "that *was* plucked," as we have learned in the following Boraitha: R. Jehudah said: In the morning the owner of the ground gets up and says, "All that the poor will pluck and gather to-day is hereby declared ownerless." R. Dosa said: The declaration is made toward evening, and thus: "All that the poor *have* plucked and gathered is hereby declared to have been ownerless"? Change the names in the Boraitha, and read instead of R. Dosa R. Jehudah, and instead of R. Jehudah R. Dosa. Why do you declare that Boraitha incorrect—better correct the statement of R. Johanan and place R. Johanan instead of R. Dosa? It may be said that the names in the Boraitha must be changed in any event, for from this Boraitha is to be inferred that R. Jehudah holds to the theory of choice,* and it is known from his statements else-

* This is explained in Section Moed.

where that he does not hold this theory. But, after all, why do you change the names in the Boraitha—because it would be a contradiction between one statement of R. Jehudah and another one? There would be the same contradiction between one statement of R. Johanan and another, as it is known that also R. Johanan does not hold to the theory of choice [and if we should make his declaration read, "that what the poor *will* gather," it would show that R. Johanan does hold to the theory of choice (as the declaration is made previous to the gathering of the fruit, and whatever had been gathered by the poor had been chosen previously in his mind)]. As R. Assi said in the name of R. Johanan: "Brothers that have partitioned among themselves estates that they inherited, they are considered as vendees, and the estates return in the jubilee year" (and we do not say that the part which came to him by partition was chosen previously to be his part of the inheritance, which, according to the biblical law, does not return; hence he does not hold to the theory of choice?). Therefore R. Johanan's statement above remains unchanged, but his statement that stolen property cannot be consecrated, etc., is based upon our Mishna (*supra*, page 149), which states, "The one who steals a stolen article from a thief does not pay double" (which is anonymous). And why so? It would be correct that he should not pay to the thief, for it is written [Ex. xxii. 6]: "And it be stolen out of the *man's house*," but not of the house of the *thief*. But why should he not pay it to the *owner* of the property? We must say, then, that to the thief he does not pay because it was not his, and not to the owner because it was not under his control; and this is the very statement of R. Johanan. But still, why should he adopt *this* anonymous Mishna and ignore the *other*—why not adopt the anonymous Mishna which treats of the pious ones? Because for this statement support can be found in the Scripture [Lev. xxvii. 14]: "And if a man sanctify his house as holy unto the Lord," from which is to be deduced that as "his house" is under his own control, so also other things which are under his own control (but not otherwise).

Abayi said: If it should not be said in the name of R. Johanan that "the pious" and R. Dosa are of the same theory, I would say that the pious ones hold to the theory of R. Dosa, but R. Dosa does not hold to the theory of the pious ones, viz.: The pious ones hold to the theory of R. Dosa because they arrived at their decision to make such declaration by draw-

ing the following *a fortiori* conclusion: A thief who has committed a sin, the rabbis made an enactment for him not to pay double (to enable him to repent and to make restitution); so much the more an enactment must be made for the poor (to prevent them from sin). R. Dosa, however, does not concur with them, for according to him the rabbis made their enactment for the poor only and not for the thief (and the law that the thief must not pay double to the first thief is not an enactment of the rabbis but a biblical law). Said Rabha: Were it not for the above statement of R. Johanan that the pious ones and R. Dosa, etc., I would say that under "the pious ones" R. Meir is meant, because did not R. Meir say elsewhere that second tithe is consecrated property, and nevertheless as regards its redemption the Law considers it as if it were under the owner's control?*

The sages of Nahardea said: No writ of replevin of personal property is granted by the court, the bailee of which denied its possession before the court. This is so when the bailee denied its possession, for it would look as if the court issued a writ the execution of which was not certain; but when he admitted possession but not ownership by the plaintiff, a writ might be issued. The same said also: A writ of replevin which does not contain the following direction: "Investigate, take possession, and retain it for yourself," is invalid; for the bailee can say to him, "The property is not assigned to you, and you are not the proper party plaintiff." Said Abayi: If the direction is contained, but it states only as to part of it, the bailee cannot say that he is not the proper party plaintiff; for if part is assigned to him by the court, he has authority to replevy the whole. Said Ameimar: If the writ did not contain the above direction, and nevertheless he took possession of it, the court cannot compel him to return it. (Rashi explains that according to other commentators it means that if the messenger of the court who executed the writ of replevin has kept the property for himself for a debt due him from one of the parties to the litigation, the court cannot compel him to give it up. Rashi approves of this explanation, saying that he found it in the Decisions of the Gaonim.) R. Ashi, however, says that the court has the right to compel him to return it, because when

* R. Meir's statement and the full discussion of it will be found translated in the forthcoming tracts at the proper place.

the court appointed one to execute its mandates it was upon the written condition that he should obey all the orders of the court ; consequently he is only a messenger of the court and he has no right to keep it for himself. And so also the Halakha prevails.

MISHNA *II.*: If two witnesses testify that one stole (an ox or a sheep), and either the same or other witnesses testify that he slaughtered or sold the same, he must pay four and five fold. If one stole the same and sold it on the Sabbath, or he stole and sold it for idolatry ; or he stole and slaughtered it on the Day of Atonement ; or he stole from his father and slaughtered and sold it, and thereafter his father died ; or he stole and slaughtered it and then consecrated it—in all those cases he pays four and five fold. The same is the case if he stole and slaughtered it in order to use it as a medicine, or to feed his dogs therewith ; or he slaughtered it and it was found unfit for eating (*trepha*) ; or he slaughtered it in the Temple court without consecrating it as an offering. R. Simeon, however, makes him free in the two last-named cases.

GEMARA: "*If he stole and sold it on the Sabbath,*" *etc.* But have we not learned elsewhere that in such a case he is free? Said Rami b. Hama: The Boraitha which says that he is free from the payment of four and five fold treats of a case where the thief sold the stolen property to the owner of a garden and received in payment figs which the thief himself plucked on Sabbath (and thus incurred the penalty of capital punishment, and there is a rule that where there is capital punishment there can be no mention of civil liability). But it may be said that such must not be considered a sale. For if, for instance, the owner of the garden should claim before the court that he has not received from the thief the value of the figs, we would not make him liable to pay for the figs as he has committed a crime, and the above maxim applies also here ; consequently there was no sale.

Said Rabha: Even in a case where the court would not entertain the plaintiff's complaint, the sale would still be called a sale as regards the same required by Scripture. As, for instance, the law prohibits the hire of a harlot, even if she was his own mother (and he promised her a sheep as her hire). Now, if she would sue him before a court for failing to pay her the hire, would the court then direct him to pay it—and nevertheless if he had given her the sheep it would be called "harlot's hire" and its use would be

prohibited? The same is the case here: although as regards the enforcement of payment of the claim the court would not interfere, still, because he transferred it to him in this manner the sale is valid.

"*If he stole and sold it on the Day of Atonement,*" etc. Why so? It is true that there is no capital punishment; but is he not liable to punishment by stripes—and there is a rule that he who is punished by stripes is free from payment? It may be said that it is according to R. Meir, who holds that stripes do not absolve from civil liability. If so, then let him also be liable if he slaughtered it on the Sabbath. And lest one say that R. Meir holds only that stripes do not free from payment but capital punishment does, have we not learned in the following Boraitha: If he stole and slaughtered it on the Sabbath . . . (although he incurs the death penalty) he pays four and five: such is the dictum of R. Meir. The rabbis, however, make him free? Said the schoolmen: Leave the Boraitha alone, as it was taught in regard to the same: R. Abin, R. Ilaa, and the whole society said in the name of R. Johanan that the Boraitha treats of a case where he slaughtered it through an agent. But is there, then, a case where one commits a transgression and another is liable for it (have we not a rule that there is no agent to commit a sin)? Said Rabha: The case here is different, for the verse reads [Ex. xxi. 37]: "And kill it or sell it." As in case of sale there must be another person (to buy it), so also in case of slaughtering, when it was slaughtered by another under his direction. The school of R. Ishmael inferred this from the additional word "or"; the school of Hezkiah inferred it from the word "for" used in that verse.

Mar Zutra opposed: Is there, then, a case where one, if he did it himself, would not be liable, but if he did it though a messenger he would be liable? Said R. Ashi to him: There the reason is not because he is not liable, but because he is guilty of a capital punishment, and the above rule applies. Now, when you say that the above Boraitha treats of a case where he slaughtered it through a messenger, why do the rabbis make him free of four and five fold? The schoolmen explained that by the "rabbis" mentioned in the Boraitha in question is meant R. Simeon, who holds that slaughtering which is not legal is not called slaughtering in accordance with the requirements of the Scripture.

"*If he stole from his father,*" *etc.* Rabha questioned R. Nahman:

If he stole an ox belonging to two partners and slaughtered him, and then he confessed to one of the partners, what is the law? Shall we say that the Scripture [Ex. xxi. 37] meant five *whole* oxen, but not *half* oxen (for every partner has a right only to one-half of each ox), or shall we say that in "five oxen" the halves are included? He answered him: The Scripture reads "five (whole) oxen," and not *half* oxen. He objected: It states further: "If he stole from his father and slaughtered or sold it, and thereafter his father died (and the thief became one of the heirs), he pays four or five." Now, when he is one of the heirs, is this not equal to the case where he confessed to one partner (and this makes him free entirely for the above reason—"an ox" and not "a half ox"; and the same ought to be here, because he is an heir, and the payment of a "whole" ox does no longer hold)? He answered him: The case here was that his father before he died laid already the matter before the court. But how is it if he had not laid the matter before the court—does he not pay? If so, why should it state in the latter part, "If he stole from his father and he died, and thereafter he slaughtered or sold it, he does not pay"? Let the Tana distinguish in the very first case, thus: This was said only where the deceased laid the matter before the court; but if he had not yet done so, he does not pay? He rejoined: It is really so; but because it states in the first part, "If he stole from his father and slaughtered it, and thereafter the father died," it also states in the latter part, "If he stole from his father, who soon died, and thereafter he slaughtered or sold it." On the next morning R. Nahman said to Rabha: (I have reconsidered the matter, have changed my mind, and came to the conclusion thus:) In the expression "five oxen" halves are included, and what I told you last night was said without careful deliberation. But what difference is there between the first and the last part (why does the latter part make him free)? He answered: The Scripture reads, "*and* killed it," which means that as the stealing was in transgression, so also ought to be the killing, as is the case in the first part. In the latter part, however, the killing was no more in transgression, as it belonged to him.

"*One who slaughtered*," etc., "*and it was found unfit*," etc. Said R. Simeon in the name of R. Levi the elder: It is considered slaughtered only when the act is fully accomplished. R. Johanan, however, says: It is so considered from the very beginning. Said R. Habibi of Husnahah to R. Ashi: Shall we assume that R. Johanan holds that the prohibition to use meat

of cattle slaughtered in the Temple court, which was not consecrated as an offering, is not biblical? (See Kiddushin, p. 58.) For if it is biblical, as soon as the act of slaughtering began it became a forbidden thing from which no benefit must be derived, and the remainder of the act was carried out on what belonged no more to the owner—why then is he liable to pay four and five fold? Said R. A'ha the son of Rabha to him: The liability is incurred from the very beginning of the act. Said R. Ashi: This is no answer, for it reads "and kill it," which means the fully accomplished act, which would not be so in this case. But then the above question remains? He rejoined: So said R. Gamda in the name of Rabha: The liability is incurred in case he cut part of the trachea and gullet outside, and the remainder of same inside the Temple court (in which case there is the fully accomplished act before it became a prohibited thing).

MISHNA *III.*: If two witnesses testify that one stole an animal, and those very same witnesses testify that he had thereafter slaughtered or sold it, and subsequently those witnesses are proved collusive, the collusive witnesses must pay the full liability of four and five fold. If two witnesses testify that he stole it and other two testify that he slaughtered or sold it, and both sets of witnesses are proved collusive, the first set pays the double and the second set pays the balance of the five. If the second set is found collusive, the thief pays for two and the collusive witnesses for three. If only one of the second set is proved collusive, the whole testimony of the second set is invalidated. If one of the first set was found collusive, the whole testimony in the case was invalidated; for if there is no theft, there can be no (liability for) slaughtering or selling.

GEMARA: It was taught: A collusive witness—Abayi said that he is considered such from the date on which he gave the collusive testimony (and all the testimony he gave since then is incompetent); for as soon as he gave the collusive testimony he was considered wicked, and it is written [Ex. xxiii. 1]: "Put not . . . . . wicked to be a witness." Rabha says that he is considered such only from the date on which he was proved collusive; for a collusive witness is an exception in the law, for they are two against two. Why, then, give more veracity to the latter two than to the former? Therefore the law applying to a collusive witness begins only from the date on which he was proved such. According to others, Rabha agrees with Abayi that he is considered collusive from the date on which the tes-

timony was given; but in case they have in the meantime signed their names to a bill of sale, Rabha does not hold the conveyance invalid, in order that the grantee should suffer no damage. In which case can there be a difference in those two versions? In case two witnesses proved the collusiveness of one and two others proved the collusiveness of the other, or that their testimony was made incompetent by other witnesses testifying that they were robbers: according to the first version the reason of Rabha is because it is an exception. Here there is no exception, because there are four against two; consequently Rabha would agree with Abayi that all their testimony given in the meantime is invalid. According to the others, who say that the reason is that the grantee shall suffer no damages by invalidating the conveyance, there is no difference whether there were two or four. R. Jeremiah of Diphthi said: There happened a case and R. Papa acted in accordance with Rabha. R. Ashi, however, said that the Halakha prevails according to Abayi. There is a rule that always the Halakha prevails according to Rabha when he differs with Abayi, except in the six cases, the case at bar being one of them.

There is an objection from our Mishna, which states: "If two witnesses testified that he stole an animal, etc., they pay the full liability." Shall we not assume that they at one time testified as to the theft and at another time as to the slaughtering, and then they were first proved collusive as to the theft and subsequently as to the slaughtering? Now then, if they were considered collusive from the date on which they gave the collusive testimony, as soon as they were proved collusive as to the theft, it was established that their testimony as to the slaughtering was incompetent, and why should they pay for the testimony of the slaughtering? It may be explained that the case was that they were proved collusive as to the slaughtering first. But still, when they were subsequently proved collusive as to the theft it was established that they were incompetent, and why should they pay for their testimony of slaughtering? The Halakha prevails that the Mishna treats of a case where their testimony was given at one and the same time, and subsequently they were proved collusive.

Rabha said: Witnesses that testified that one has committed murder and the court found the accused guilty on their testimony, and two other witnesses subsequently denied the testimony, and still another set of two witnesses testified that the first two

were with them at another place at the alleged time of the murder (*alibi*), which testimony makes them collusive (according to Scripture), they must suffer the death penalty, for denial is the beginning of collusion which is subsequently proved by the last witnesses. And he said again: My theory is based upon the following Boraitha: "If two witnesses testify that a certain person blinded his slave's eye and thereafter knocked out one of his teeth, and they also testify that the owner of the slave admitted it, and subsequently the witnesses are found collusive, they must pay to the slave the value of the eye." Now, how is the case? Shall we assume that it was as stated without any other set of witnesses to deny the former testimony, and the slave was manumitted on their testimony, then the expression ought to be "and they pay to *him* (instead of 'to the slave,' for he was already manumitted) the value of his eye, and to his master the value of an uninjured slave"? Another proof is that the case is that there was no denial—that they also testify that the owner admitted it, for what purpose it this? We must therefore say that another set of two witnesses testify that he knocked out one of his teeth first, and then blinded his eye, in which case the owner must pay him the value of the eye; then came a third set of witnesses and testified that he *first* blinded his eye and *then* knocked out his tooth, in which case the owner must pay him only the value of the tooth, because there is a contradiction between the first and the middle sets, and the statement that the owner admitted it means that he is more satisfied with their testimony, as he has to pay only the value of a tooth, and the statement that they were found collusive has reference to the middle set, and nevertheless it is stated that they must pay the slave the value of the eye, hence that denial is the beginning of collusion. (For if it is not, why should the law of collusion apply to them after their testimony became incompetent?) Said Abayi: Nay, not as you say, that because if there would be three sets of witnesses, as soon as the middle one was denied by the first one the third set could not make it collusive. The case, however, was that the set which became afterwards collusive is the first set, and your proof from the fact that the Boraitha does not state that the collusive set has to pay to the master can be explained thus: The second set did not deny the fact, but only reversed the order, *i.e.*, they say to the first set, "On that day on which you claim that the master had blinded his eye," etc., "you were with us and you could not witness the crime; but we did witness on another day that the master first

knocked out his tooth and then blinded his eye." And therefore the Boraitha does not state that they must pay the value of the slave, etc., because the slave becomes free even on their testimony; and I take this from the last part of the same Boraitha: "We testify that a certain person knocked out his slave's tooth and blinded his eye, and this is just as the slave says, and thereafter they were proved collusive, they pay the value of the eye to the owner." Now, how was the case? If the second set does not admit any wounding at all, then the first set must pay to the owner the value of the whole slave. It is therefore apparent that all admit that he wounded him, but that they reverse the order of the wounding, and thus prove them collusive. Now, as the last part treats of a case where they became collusive through the reversal, the first part must also treat of a similar case. (Says the Gemara:) After all, let us see how the case was: If the second set testify that it happened on a later date, then the first must still pay the full value of the slave, because on the day on which they testify it happened the slave had not to be manumitted? We must therefore say that the second set testify that it happened on an earlier date. But still, even in such a case, if the slave had not summoned him to court before the testimony of the first was given, they must still pay the full value of the slave; for before their testimony the owner was not subject to liability (to manumit the slave)? It must therefore be said that the case was after judgment was given.

R. Zera opposed: Whence do we know that money must be paid? Perhaps when he only blinded his eye he is manumitted because of that, if when he only knocked out one of his teeth he is manumitted because of that, and when he did both—blinded his eye and knocked out one of his teeth—he is also only manumitted and no money is paid. Said Abayi: As to your question, the verse reads, "for the sake of his tooth," which does not mean for the sake of his tooth *and* eye; and also "for the sake of his eye," which does not mean for the sake of his eye *and* tooth.

Regarding witnesses whose testimony was first denied and then proved collusive (as to which Abayi and Rabha differ above), R. Johanan and R. Elazar also differ: One holds that they are put to death, the other holds that they are not. It may be inferred that the one who holds that they are not put to death is R. Elazar, for he said elsewhere that witnesses whose testimony was only denied (but not proved collusive), in a case in which human life was involved, have to suffer the penalty of

stripes. Now, if we should assume that R. Elazar is the one who holds that they have to suffer the death penalty if proved collusive, why should they be punished with stripes in case their testimony was only denied? is it not a "negative process" that entails the death penalty by the court, and in such cases no stripes are administered? We must therefore say that it is R. Elazar who holds in the above Boraitha that they have not to suffer the death penalty.

"They are punished with stripes." Why so? Are they not two against two? Why should more credence be given to the one set than to the other? Said Abayi: The case is that the supposed murdered person appeared in court alive.

MISHNA *IV.*: If two witnesses testify that he stole it, and one witness, or he himself, testifies that he slaughtered or sold it, he pays only two, but not four and five fold. If he stole and slaughtered it on Sabbath, or sold it for purposes of idolatry; if he stole it from his father and this latter died, and subsequently he slaughtered or sold it; if he stole and consecrated it, and thereafter slaughtered or sold it—in all those cases he pays only double and not four and five fold. R. Simeon says: If one stole consecrated cattle for which the one who consecrated them is responsible, and slaughtered them, he must pay four and five fold; if, however, it is that for which he is not responsible, the thief is free.

GEMARA: The Mishna states, "If one witness," etc. Is this not self-evident? It may be said that it means to teach us that when he himself admits that he slaughtered, it is equal to the case where one witness testifies; as in the latter case, if thereafter another witness comes and testifies to the same thing, their testimony is taken together to make up the requisite number of witnesses, so also in this case the testimony of another witness is added to his own, in opposition to what R. Huna said in the name of Rabh, that one who admits to the court that he has incurred the liability to pay a fine and thereafter witnesses appear, he is free. R. Hisda objected to R. Huna's statement from the following: It happened that R. Gamaliel blinded the eye of his slave Tabi and he was very glad of the occurrence. When he met R. Jehoshua, he said to him: Do not you know yet that my slave Tabi is manumitted because I blinded his eye? Said R. Jehoshua to him: Your statement does not make him free, for he has no witnesses. Hence we infer from R. Jehoshua's answer that if there appear witnesses after an admission of the

incurrence of the liability to pay a fine, the latter must be paid? He answered him: The case of R. Gamaliel is different, for he had not admitted it before the court. But was, then, R. Jehoshua not the president of the court? Yea, but it was not during the session of the court, but only as to a private person. But have we not learned in another Boraitha that what R. Jehoshua said to him was: This is nothing, for you yourself admitted it (from which is to be inferred that even if witnesses appear thereafter he is also free)? And is it not also to be assumed that the reason for the different statements of the Boraithas is: The Tana who says that he told him, "because he has no witnesses," holds that if witnesses should appear after the admission the slave would be liberated, and the Tana who says that R. Jehoshua told him, "because you already admitted," means to say that after admission the testimony of witnesses is of no avail? Nay, all agree that witnesses who appear after an admission count nothing; but the point of difference is this: The one who says, "because he has no witnesses," means that it was not before the court, and the one who says, "because you already admitted," means that he had done so before the court.

It was taught: "One who admits that he has incurred the liability of a fine and thereafter witnesses appear, Rabh says that he is free. Samuel, however, says that he must pay." Said Rabha for Ahilai: The reason of Rabh's theory is because in the verse [Ex. xxii. 3] the word "found" is repeated twice, which means that if it should be "found" by testimony of witnesses, he should be "found" (liable to pay the fine) by the court, excluding the case of self-incrimination. But is this not deduced from the verse [ibid., ibid. 8]: "And he whom the *judges* may condemn"? We must therefore say that the first-quoted verse means to exclude the case where one admits his liability to pay a fine and thereafter witnesses appear.

What does Samuel deduce from this verse? He deduces that the thief himself must pay double, as it was taught in the school of Hezkiah that the double payment applies only when he himself stole it, but not where he claims that it was stolen from him. Rabh objected to Samuel from the following: If on seeing that witnesses were coming the thief admits the theft, but denies the slaughtering, etc., he pays only the principal. (Hence we see that if he admits before witnesses appear he is free from the payment of double, which is a fine?) He answered him: The case is that the witnesses withdrew and did not appear. But since it

states in the last part: "R. Elazar b. R. Simeon said: Let witnesses come and testify (after he admitted, so that the fine should be paid)," it is to be inferred that the Tana of the first part holds that he is not liable (although the witnesses came and testify?) Said Samuel: The very same R. Elazar b. Simeon quoted by you, who holds as I do, is the basis of my theory.

According to Samuel, surely Tanaim differ (and the Tana of the first part cannot be explained to be in accordance with him); but according to Rabh is it to be assumed that he explains Elazar's statement to be in accordance with him, namely: Elazar's statement was only where he admits for fear of witnesses; but where the admission is made without such fear, even he would concede that he is free? (Yea, so it is.) Said R. Hamnuna: It seems that Rabh's theory is applicable to the following case: If one confesses to theft and thereafter witnesses testify to the same, he is free from fine, for by his confession he made himself liable to pay the principal; but when he first denies, and after witnesses testify that he committed the theft he confesses to both the theft and the slaughtering, he is liable to pay four and five fold, for he sought to free himself entirely. Said Rabha to him: By your statement you caused grief to all the elders of the college: Did not R. Gamaliel by his confession, "I have blinded the eye of my slave," make himself free from fine, and still R. Huna, who was objected to from this fact by R. Hisda, did not give the reason stated by you (and R. Huna was an actual disciple of Rabh? hence, your statement is not correct)? (Notwithstanding the objection of Rabha, it was taught by R. Hyya b. Aba in the name of R. Johanan exactly as stated by R. Hamnuna.)

Said R. Ashi: From both our Mishna and the above-quoted Boraitha it is also to be inferred that R. Johanan's statement is correct, viz.: The Mishna, viz.: "If two witnesses testify that he committed the theft," etc. Why should it not better state: "If one witness or he himself testifies that he stole and slaughtered it, he pays only the principal" (for all what the Mishna means to teach us is that one's own confession frees him from the payment of fine; and if it should state as just mentioned, it would also include the payment of four and five fold)? We must therefore say that the Mishna comes to teach that only in case he did not make himself liable even for the payment of the principal, as e. g. that witnesses testify to the theft, and he only confessed, or one witness testifies to the slaughtering, etc., then only may it be said that his confession is equivalent to the testimony of one

witness; so that if another witness should come thereafter and testify, his testimony would be added to that of the first witness and he would be liable; so also if after he confessed one witness appears, his testimony should be added to the confession, and he should be liable to pay four and five fold; but when he first confesses to both the theft and the slaughtering, or only one witness testifies thereto, in which case he makes himself liable to the payment of the principal, if even thereafter another witness comes, his testimony is not to be added to the confession, and he has to pay only the principal.

The Boraitha, viz.: "If one seeing witnesses coming confesses to the theft, but denies the slaughtering," etc. Why does the Boraitha state as it does? Let it state, ". . . and he admits that he stole it, *or* that he slaughtered and sold it, he pays the principal only"? (And we would infer from this that also when he even admits only the slaughtering, in which case he seeks to be entirely free, it is nevertheless considered an admission to make him liable for the principal?) We must therefore say that it means to teach us that only when he confess to the theft which makes him liable to the payment of the principal he is free (from fine), but when he does not confess to the theft, but the same is proved by witnesses and thereafter he admits that he slaughtered and sold it, and subsequently the same is also proved by witnesses, in which case he did not make himself liable even to the payment of the principal, he is liable (also to pay fine). Hence, we see that the admission of having slaughtered it (not coupled with the confession to the theft) is not considered an admission at all? Nay, it may be said that it means to teach us this very thing, viz.: Because he confessed to the theft, although he did not admit that he slaughtered or sold it, and thereafter witnesses testify that he slaughtered and sold it, he is nevertheless free from four and five, for the Scripture reads, "four or five," but not "four or three" (and here, when he confesses to the theft, he is liable to the payment of the principal only, and if we should make him liable for the slaughtering, etc., he would have to pay two more for a sheep or three more for an ox, so that it would be "three or four," but not "four or five").

"*If he stole and consecrated it, and thereafter slaughtered or sold it,*" etc. This would be correct in case of slaughtering, for at the time of the slaughtering it was already consecrated property and not that of the owner. But why should he not be liable for the consecration itself—is this not considered a transfer from one

owner to another, and what difference is there whether he sold it to a human being or to the sanctuary? Nay, there is a difference: In the first case its name is changed, for before the sale he is the ox of Reuben and after the sale he is the ox of Simeon, while when he consecrated him he still continues to be known as "*Reuben's* consecrated ox."

"*R. Simeon says,*" etc. Now, when R. Simeon holds that there is no difference whether he is sold to another person or sold to the Sanctuary, then the reverse should be the conclusion: If his responsibility still continues after the consecration, he should be free, because it is still under his control; and if his responsibility ceases upon the consecration he should be liable, for by the act of the consecration he placed it under the control of the Sanctuary; and according to him, it is the same as if he sold it to a commoner? R. Simeon's statement has reference to the following Boraitha: "It may be said that the payment of four and five fold applies neither to one who steals stolen property from a thief, nor to one who steals consecrated property from the house of him who consecrated it, because it is written [Ex. xx. 6]: 'And it be stolen out of the *man's* house,' which means but not out of the house of the Sanctuary." * R. Simeon says: If he is responsible for the consecrated property, he is liable, for the reason that it is still under his control, and the verse, "be stolen out of the *man's* house," is still to be applied, but not when it is not under his control. Rabha questioned: If one makes a vow to bring a burnt-offering and sets aside an ox for such offering, and thereafter the ox is stolen, may the thief make restitution by returning a sheep, according to the rabbis, or a dove or a pigeon, according to R. Elazar b. Azariah, as we have learned in the following Mishna: "If one say, 'I oblige myself to bring a burnt-offering,' he may bring a sheep; R. Elazar b. Azariah, however, says that he may bring a dove or a pigeon." Now, how is the law in our case: Shall we assume that the thief may say, "You obliged yourself to bring a burnt-offering, and here it is," or the owner may say, "My wish is to do this merit in the best manner possible"? After he questioned, he himself answered: The restitution of the thief is acceptable according to the rabbis if it is a sheep, and according to R. Elazar b. Azariah if it is a fowl. R. A'ha the son of R. Iqa taught that the above

* Because it now belongs to the Sanctuary and not to him who consecrated it, it is considered as if it would be stolen from the house of the Sanctuary.

saying of Rabha was not questioned and answered as stated above, but was originally said so by him.

MISHNA *V.*: If the thief sells all but one-hundredth part of it, or he is a co-owner of it, or he slaughters it illegally so that it becomes a carrion, or he lacerates it (from the nostrils to the heart), or he tears the trachea and gullet, he pays only double, but not four and five fold.

GEMARA: What is meant by one-hundredth part of it? Said Rabh: It means of the meat which is made permissible for use by the legal slaughtering of the animal. Levi, however, holds even of the wool which is to be shorn. So also was taught plainly in a Boraitha. But according to whom, then, is Rabh's statement? According to R. Simeon b. Elazar of the following Boraitha, who said: "If he sells all but one of its fore or hind legs, he does not pay four and five fold; if, however, he sells all but its horns or its wool, he does pay four and five fold." On what point do they differ? The first Tana holds that "and kill it or sell it" [Ex. xxi. 37] means, as in case of slaughtering, it must be the whole, so also in case of sale. R. Simeon b. Elazar, however, holds that the fore and hind legs, which require legal slaughtering, if he excluded them from the sale, it is considered a sufficient remainder, and he is free from payment of four and five fold; but the horns and wool, which require no slaughtering, are not considered a sufficient remainder.

The rabbis taught: "One who steals an animal one leg of which is missing, or which is lame or blind, or one who steals an animal belonging to a co-partnership, is liable. But partners that steal together are free." But have we not learned in another Boraitha that partners are liable? Said R. Na'hman: This presents no difficulty: The first Boraitha treats of a case where one partner stole of his co-partner (and therefore it is not considered a sale of the whole, for he himself is entitled to half), and the other Boraitha treats of a case where one partner steals from a third party. Rabha objected to R. Na'hman: "Lest it be assumed that a partner who steals from his co-partner, or two partners that steal together (from a third party), should be liable, therefore it is written [ibid]. 'And kill it,' which means the *whole* of it, which cannot be the case here?" Therefore said R. Na'hman: This presents no difficulty: The Boraitha which states that he is liable means a case where he slaughters it with the knowledge of his co-partner (in which case he is considered the agent of the other partner, and the act is that of both part-

ners), and the Boraitha which states that he is free means a case where he slaughters it without the knowledge of his co-partner (in which case it is considered that he slaughters the part stolen by his co-partner, which he did without permission, and it was said above that if one slaughters the animal stolen by another one is free from four and five fold; for his own half, however, he cannot be liable, for it is not considered the slaughtering of the whole).

The Rabbis taught: "If he steals it and gives it to another party who slaughters, sells, or consecrates it; or he steals and sells it to another party on credit, or exchanged it, or makes a present of it, or gives it to his creditor in payment of a loan made to him, or he gives it to his creditor in payment for merchandise sold to him on credit, or makes it a bridal-gift—in all those cases he pays four and five fold." What new thing does this mean to teach us? The first part, which states the case where he gives it to another who slaughters it, means to teach us that in this particular case he is liable for the act of his agent, although in other cases one who appoints a messenger to commit a transgression is not liable for the act of the messenger (see above, p. 120, and the latter part, which states that he consecrates it, means to teach us that there is no difference whether he sells it to an ordinary person or to the Sanctuary.

MISHNA *VI.:* (The liability to the fine of four and five fold applies only where the thief slaughters it after he acquired title to it, or he slaughters it outside of the owner's premises, namely:) If he steals it within the premises of the owner and slaughters or sells it ouside of it, or he steals it outside of the owner's premises and slaughters or sells it within the premises, or the stealing, slaughtering, and sale are outside of the owner's premises, he pays four and five fold. If, however, the stealing, slaughtering, and sale are within the owner's premises, he is free.

If while the thief is leading the animal out it dies, still within the premises of the owner, he is free. If he lifts it up or leads it out of the premises, and it dies, he is liable. If he redeems his first-born son with it, or he gives it to his creditor, or to a gratuitous bailee or to a borrower to do work with it, or to a bailee for hire, or to a hirer, and the other person is drawing it forth and it dies while still on the premises of the owner, he is free. If, however, he lifts it up or he leads it out of the premises and it dies, he is liable.

GEMARA. Ameimar questioned: Was it enacted that a

bailee should not be liable unless he should first draw (see above) the bailment, or not? Said R. Imar to him: Come and hear the statement of our Mishna: "If he redeems his first-born son with it, or he gives it to his creditor, etc., he is free." Does this not mean that the bailee drew it? Infer from this that there is such an enactment. We have so also learned in the following Boraitha: "R. Elazar said: As it was enacted that a buyer has to acquire title by drawing the article he buys, so also was it enacted that the bailee should draw the bailment when he takes it under his control." So also we have learned in a Boraitha with the addition: "And as title to real property can be acquired by money, conveyance, and occupancy (*hazaka*), so also title to rents can be acquired by those three." What kind of rents? Shall we assume rent of personal property—can, then, personal property be rented by a conveyance? Must it not be drawn? Said R. Hisda: Rent of real property is meant.

R. Elazar said: If it was noticed that the thief was hiding himself in the forest (for the purpose of stealing an animal) and he slaughters or sells it therein, he pays four and five fold. Why so—he had not drawn it? Said R. Hisda: The case was that he drove it on with a stick. But if he did it so openly that it could be noticed, then he is a robber (and not a thief, and according to the Scripture he is free from the payment of four and five fold)? Nay, because he tried to hide himself, he is considered a thief. Under what circumstances, then, can he be considered a robber? Said R. Abbahu: As, for instance, Benayahu the son of Yehoyada, of whom it is written [II Samuel, xxxiii. 21]: "And he snatched the spear out of the Egyptian's hand and slew him with his own spear." R. Johanan says: As, for instance, the men of Shechem, of whom it is written [Judges, ix. 25]: "And the men of Shechem set persons to lie in wait for him on the top of the mountains, and they robbed all that passed by them on that way."

The disciples questioned R. Johanan b. Zakkai: Why did the Scripture treat more rigorously with the thief than with the robber? He answered them: Because the robber put the honor of his Creator at least on the same level with that of His servant, while the thief did not do so, but, on the contrary, considered the eye and ear of Heaven as if it would not see and hear; as it is written [Is. xxix. 15]: "Woe unto those that seek to hide deeply their counsel from the Lord, so that their works may be in the dark, and they say, Who seeth us?" etc.; and it is also written [Ps. xliv. 7]: "And they say, The Lord will not see, and the God

of Jacob will not take notice of it"; and it is also written [Ezek. ix. 9]: "For they have said, The Lord hath forsaken the land and the Lord seeth not."

R. Meir said: The following parable was related in the name of R. Gamaliel: To what is the above equal? To two persons who lived in one and the same town. One made a feast and invited all the inhabitants of the town, but not the princes; the other one made a feast and invited neither the inhabitants nor the princes. Whose punishment ought to be severer? Surely that of the first one.

The same said again: Ponder over the greatness of labor: In case of stealing an ox which he prevented from laboring, the thief pays five; in case of a sheep which does not perform any work, he pays only four. R. Johanan b. Zakkai said: Ponder over the greatness of the honor of creatures. For an ox who walks with his feet, he pays five; but for a sheep, for which he had to humiliate himself by carrying it on his shoulders, he pays only four.

MISHNA *VII.*: No tender cattle must be raised in Palestine, but they may be raised in Syria and in the deserts of Palestine. No cocks or hens must be raised in Jerusalem (even by laymen), because of the voluntary offerings (the meat of which may be eaten in any part of the city, and as the habit of the named fowls is to peck with their beaks in the rubbish, they may peck into a dead reptile and then peck in the meat of the offerings). In all other parts of Palestine priests only must not raise them, as they use leave-offerings for their meals, and they must be very careful about cleanliness. Swine must not be raised by Jews at any place. One shall keep no dog unless on a chain, and no noose is to be laid out for trapping pigeons unless fifty riss distant from inhabited places.

GEMARA: The rabbis taught: "No tender cattle must be raised in Palestine but in its forests; in Syria, however, even in the inhabited places, and, of course, in all other places." Another Boraitha states: No tender cattle must be raised in Palestine but in the deserts of Judea, and in those of the village of Achu; and although no tender cattle must be raised, still large cattle may, for no restrictions are made for the community unless most of the people can observe them. Tender cattle may, but large cattle may not be imported from other countries. And although they must not be raised, still they may be kept during the thirty days immediately preceding a feast day, or the celebration of the wedding of one's children. But this shall not be construed to mean

that they may be kept for thirty days, and that if some cattle were bought less than thirty days before the feast day that one may continue keeping them after the feast day until the expiration of the thirty days, but that as soon as the feast day is over he must not keep them any longer. The butcher, however, may buy and slaughter them at once, or keep them (until the market day), provided that the cattle he bought last shall not be kept after the market-day to complete the thirty days.

The disciples once questioned R. Gamaliel, whether it was permitted to raise tender cattle, and he answered: "Yea." But have we not learned in our Mishna that it is not? It must be said, therefore, that they questioned him whether it was permitted to keep them, and he answered them: "Yea, provided they are kept locked in the house, so that they shall not go out and pasture with the flock."

The rabbis taught: It happened that a pious person was suffering from a severe cough, and the physicians declared that he could not be cured unless by drinking every morning fresh-drawn milk which was still warm. He obtained a goat, which he tied to the leg of his bed, and drew her milk every morning. Once his colleagues came to visit him, and on seeing the goat tied to the leg of the bed they turned back, saying: There are armed robbers in the house of this man (for the habit of a goat is to stray upon other's fields), and shall we visit him? They sat down and examined into his conduct, and found no other transgression in him except that one. The pious one himself before he died said: I know that there can be no other transgression found in me except the one of the goat, that I disregarded the prohibition of my colleagues.

R. Ishmael said: My father's family was of the citizens of upper Galilea, and why was that locality destroyed? Because they pastured their young cattle in the forests and tried civil cases by one judge; and although their forests were near their houses (in the immediate neighborhood, and they were pasturing their cattle in their own forests), still, a small-sized field was between those forests (which belonged to strangers), and they used to pass their cattle over that field.

The rabbis taught: "A shepherd (who raises tender cattle) that repented, we do not compel him to sell out all his cattle at once, but he may do so by degrees. So also is the case with a proselyte who inherited dogs and swine; we do not compel him to sell out all at once. So, also, one who made a vow to buy a

house or marry a woman in Palestine; we do not compel him to do so until he finds one fit for him. It happened once with a woman whom her son used to annoy, that she swore that she would marry the first one who would propose to her, and unsuitable persons came forward with propositions. When this came before the sages, they declared that her intention was only for a suitable person.

As it was said that no tender cattle must be raised (in Palestine), so also was it said that no tender beasts should be raised. R. Ishmael, however, said that hunters' dogs, cats, monkeys, and weasels might be raised, for they are kept for the purpose of keeping the house clean. R. Jehudah said in the name of Rabh: We follow in Babylon the practice prevailing in Palestine regarding tender cattle. Said R. Ada b. Ahba to R. Huna: But do not you raise tender cattle? He answered: Mine are taken care of by Haubah my wife. According to others, R. Huna said: We follow in Babylon the practice prevailing in Palestine regarding tender cattle since Rabh settled in Babylon (whom many followed from Palestine and who bought or rented all the land in Babylon). Rabh, Samuel, and R. Assi happened to meet at a circumcision feast, and according to others at a redemption feast. Rabh declined to enter the house before Samuel, and Samuel declined to enter before R. Assi, and the latter in his turn refused to enter before Rabh. It was then decided that Samuel should wait until Rabh and R. Assi had entered. (But why did Rabh refuse to enter before Samuel, he was surely greater than Samuel?) Rabh simply paid this courtesy to Samuel on account of his cursing him (see Sabbath, pp. 221–222). While they were so discussing a cat came and bit off the arm of the child, after which Rabh lectured that it is permitted to kill a cat and prohibited to keep it and that there can be no robbery in respect to it, and that if a cat gets lost no one need return it to its owner. If it is permitted to kill it, is it not self evident that it is prohibited to keep it? Lest one say that there is no prohibition to kill it but it may also be kept, hence the statement. Again, if it says that there can be no robbery in respect to it, why, then, the statement that it need not be returned to its owner if lost? Said Rabhina: It means even as far as its skin is concerned. An objection was raised from our Mishna: "R. Simeon b. Elazar said: Dogs, cats, etc."? This presents no difficulty. A black one may, but a white one may not. But in the case of Rabh, was it not a black one? It was a black descending from a white one.

R. A'ha b. Papa said in the name of R. Hanina b. Papa * the following three things: (*a*) In case of a plague of the itch a fast day with the blowing of the horn may be ordered on the Sabbath; (*b*) if the door of success is closed to one, it will not open soon; and (*c*) if one buy a house in Palestine, the deed may be written and executed even on Sabbath. What does the statement, "if the door of success," etc., mean? Said Mar Zutra: The granting of a diploma for a rabbi †. R. Ashi said: It means that when one falls into misfortune he cannot soon recover. "If one buy, etc., the deed, etc., on Sabbath." Does it really mean that the Sabbath may be violated in such a case? Nay, it means as Rabha said, that a Gentile may be told to do it, although in ordinary cases the rabbis prohibited it on account of Sabbath-rest; still, in this particular case they did not. R. Samuel b. Na'hmani said in the name of R. Jonathan: One who buys a town in Palestine is compelled also to buy a tract of land around it to make it accessible from all four sides, in order to promote settlement in Palestine.

The rabbis taught: "Upon the following ten conditions did Joshua divide the land to the settlers: (*a*) That one may pasture his cattle in the forest of another; (*b*) he may gather wood upon another's field; (*c*) grass may be gathered on another's field at any place, except that of the carob-bean; (*d*) a branch may be cut off a tree at any place, except of an olive tree; (*e*) the towns-people may use the water of springs even newly opened by strangers; (*f*) nets may be spread in the Tiberian waters by every one for fishing purposes, provided he does not stake them so as to interfere with navigation; (*g*) one may evacuate behind a fence even of a field of saffron; (*h*) one may walk the cross way (opened on a field) until the second quarter of the season; (*i*) one may walk the side road when the main road is cloddy; (*j*) one who lost his way in a vineyard might raise and lower the tree branches in trying to find it; and, lastly, (*k*) a stranger who dies in a field should be interred in the place where he dies (see Erubin, p. 38)." Are there only ten, are there not eleven enumerated? The condition that one may walk the cross-walks was not made by Joshua but by Solomon, as we have learned in the

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* Papa had many children, and the Gemara is not certain who of them was the author of this statement.

† There were many sages who were worthy of this honor, but circumstances prevented them from getting the diploma. The well-known Samuel was one of them. (See Vol. XI., Tract Baba Metzia.)

following Boraitha: When all the fruit is gathered in from the field and the owner still permits no one to enter his field, do not people murmur and say: What benefit does that man derive from it and what injury would the people cause him by crossing his field? Of him the verse says: When you can afford to be good, do not cause people to call you bad. Is there, then, such a verse to be found in Scripture? There is a verse similar to it, viz. [Proverbs, iii. 27]: "Withhold not a benefit from him who is deserving it, when it is in the power of thy hand to do it."

But are there no more than those enumerated? Is there not another one, of which R. Jehudah speaks in the following Boraitha: "R. Jehudah says: During the manuring season, etc., for on this condition did Joshua, etc. (supra, p. 66)?" Again, there are those enumerated in the following Boraitha: R. Ishmael the son of R. Johanan b. Broka says: The court declared the following conditions to have been made by Joshua when he distributed the land among Israel: (*a*) That one may enter his neighbor's orchard to cut off a tree branch and use it in saving his bee-hive, paying the owner of the orchard the value thereof; (*b*) one shall empty his vessel containing wine and save therewith his neighbor's honey (if one carrying wine and one carrying honey met together and the vessel containing the honey broke), and receive from him the value of the wine; (*c*) one shall unload his wood and load on his neighbor's hemp (under circumstances similar to those stated above), and get from him the value of his wood? The Boraitha enumerated only those which were declared to have been so unanimously, but not those that were stated by individuals without being supported by their colleagues.

But did not R. Abin upon his return (from Palestine) say in the name of R. Johanan that one more condition was made by Joshua, namely, that whether it be a tree branching over into a neighboring field or one standing near the boundary, he may bring the first-fruit to Jerusalem and read the scriptural passages [Deut. xxvi. 5]; and if the above-enumerated ten conditions were a Boraitha, R. Johanan, who was (not a Tana but only) an Amora, would not contradict it? Therefore it must be said that the phrase, "The rabbis taught: Ten conditions," mentioned above does not mean that it was a Boraitha (as it usually indicates), but that it was taught by R. Jehoshua b. Levi (who was also an Amora, and R. Johanan may differ with him). R. Gebiah of the city of Khthil taught so plainly: R. Tan'hum and R.

Brice said in the name of the certain elder who was R. Jehoshua b. Levi, that ten conditions did Joshua make with the settlers.

Ten enactments were enacted by Ezra, viz.: (*a*) That portions of the Scripture should be read at the Saturday afternoon prayer; (*b*) on Mondays and Thursdays; (*c*) the court should be open on Mondays and Thursdays; (*d*) clothes should be washed on Thursdays (for the honor of the Sabbath); (*e*) garlic should be eaten on the eve of Sabbath; (*f*) a woman should do her baking early in the morning (so as to have fresh bread for the poor who should ask for it); (*g*) a woman should wear underwear; (*h*) a woman should comb her hair before immersing (in the legal bath); (*i*) vendors should travel from town to town and peddle their wares unmolested. He also enacted immersion (in a legal bath) for those who see Keri (wet-dreams). Ten things were said of the city of Jerusalem (when it was the capital of Palestine): (*a*) Real property should always be redeemed by the seller; (*b*) if a slain person is found in the neighborhood of Jerusalem, the ceremony of the heifer [Deut. xxi.] should not be performed; (*c*) it should never be declared a condemned town [Deut. xiii. 14]; (*d*) the laws of plagues [Levi. xiv. 35] should not apply to the houses of Jerusalem; (*e*) no beams should be permitted to protrude, nor any corner boards (Erubin, p. 40); (*f*) no dumping places for rubbish should be permitted therein; (*g*) no potter's kiln should be permitted to be constructed therein; (*h*) no gardens or orchards should be permitted there except those of roses, that existed since the time of the first prophets; (*i*) no hens or cocks should be raised; and (*j*) no dead body should remain over-night in the city (but should be carried out of the city).

"*No swine is permitted to be raised at any place.*" The rabbis taught: "During the civil war of the Maccabees, Hurkanoth was within and Aristobulos was without the city wall, and every day those within lowered by means of a chair a basket full of dinars from the top of the wall to those outside, and the latter sent them up cattle for the daily sacrifices. Among the outsiders was an old man who was learned in Greek science, and he said to them: So long as your enemies continue to perform the holy service you will not subdue them. On the next day, when the basket of dinars was lowered, they sent them up a swine. When the swine reached the centre of the wall he fastened his feet in the wall, and Palestine trembled for a distance of four hundred square parsa. At that time it was declared that cursed be he who raised swine and cursed be he who taught his sons Greek

science. Of that time it was taught (Tract Mena'hoth, p. 64*b*) that the omer was brought from the gardens of Zriphin and the two loaves from the valley of Ein Sokher."

But is, then, the study of Greek science prohibited—have we not learned in the following Boraitha: "Rabbi said: In Palestine there is no use for the Syriac language, which is not clear, when there are the Holy language (pure Hebrew) and the Greek language, both of which are very clear; and R. Jose said: In Babylon there is no use for the Aramean language, for there are the Holy language and the Persian language"? It may be said: Greek language is one thing and Greek science is another. But is, then, the study of Greek *science* prohibited—has not R. Jehudah said in the name of Samuel: So said R. Simeon b. Gamaliel: It is written [Lam. iii. 51]: "My eye affected my soul because of all the daughters of my city. There were a thousand young men in my father's house, five hundred of whom studied Scripture and five hundred *Greek science*, and of all of them only two remained: I here and my nephew in Assia"? R. Gamaliel's house was an exception, for its proximity to the government, as is stated in a Boraitha: "He who cuts his hair *χομη* imitates the ways of the Amorites, which are prohibited [Lev. xviii. 3]. Abtulmus bar Reuben, however, was permitted to do so, for he had stood near the government. The house of R. Gamaliel was permitted to study Greek science for the same reason."

"*No dog shall be kept*," etc. The rabbis taught: No one shall raise a dog unless he is kept on a chain, or unless in a town adjoining the frontier, in which he is permitted to keep him without a chain only in the night-time. There is a Boraitha: R. Eliezer the great said: The raising of dogs is equivalent to the raising of swine. For what purpose is this equivalence? That the curse said of him who raises swine should apply also to him.

R. Joseph b. Maniumi said in the name of R. Na'hman: Babylon [Nahardea] is considered a city located at the frontier.

R. Dosthai of Biri lectured: It is written [Numb. x. 36]: "And when it rested, he said, Return, O Lord, among the myriads of the thousands of Israel." Infer from this that the Shekhina does not rest on Israel unless they number two myriads two thousand. If it should happen that this number should be one less and there should be a pregnant woman whose child when born would complete it, and a dog should bark and cause the woman to miscarry, it would appear that he caused the Shekhina to withdraw from Israel.

It happened with a woman that entered a house to bake there, etc. (See Sabbath, p. 124).

"*No nets are spread,*" etc. But do we go as far as that? Have we not learned in the following Mishna: "Dove-cots may be located at a distance of fifty ells from a town"? Said Abayi: They fly for a much longer distance, but as to pecking up food they do so only within fifty ells. But do they fly only thirty ris?* Have we not learned in the following Boraitha that nets should not be spread out in the neighborhood of inhabited places, even at a distance of one hundred mil? R. Joseph said that "inhabited" means where vineyards are laid out, Rabba said that it means where dove-cots are kept. If so, let him say that it must not be done for the doves themselves, in order that they should not be caught in? If you wish, it can be answered that the doves are ownerless; and if you wish, it can be answered that he himself is the owner of the doves.

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* Seven and a half ris equalled one Palestinian mile.

CHAPTER VIII.

THE FIVE ITEMS OF PAYMENT IN CASE OF INJURY TO A HUMAN BEING, INDEPENDENTLY OF THE CRIMINAL LIABILITY. THE LIABILITY FOR ASSAULT WHEN NO INJURY IS SUSTAINED.

MISHNA *I.*: One who wounds his neighbor is liable to pay the following five things, viz.: damage, pain, healing, loss of time, and disgrace. "Damage."—If he blinds one's eye, cuts off his hand, or breaks his leg, the injured person is considered as if he were a slave sold in the market, and he is appraised at his former and his present value. "Pain."—If he burns him with a spit or with a nail, if even only on the nail (of his hand or foot), where it produces no wound, it is appraised how much a man his equal would take to suffer such pain. "Healing."—If he caused him bodily injury, he must heal him; if pus collected by reason of the wound, he must cause him to be healed; if, however, not by reason of the wound, he is free. If the wound heals up and breaks out again, even several times, he must cause it to be healed; if, however, it once heals up thoroughly, he is no more obliged to heal it. "Loss of time."—The injured person is considered as if he were a watchman of a pumpkin field, as he was already paid the value of his hand or foot. The disgrace is appraised with consideration of the station and rank of the one who causes as well as of the one who suffers it.

GEMARA: Why so? Perhaps it is to be taken literally, for the Scripture reads [Ex. xxi. 24]: "Eye for eye"? This cannot enter the mind, as we have learned in the following Boraitha: Lest one say, if he blinds one's eye or cuts off one's hand, that the same should be done unto him, therefore it is written [Lev. xxiv. 21]: "And he that killeth a beast shall make restitution *for it;* and he that killeth a man," etc. As in case of a beast only the value is paid, so also in case of a man. And lest one say, Does not the Scripture read [Numb. xxxv. 31]: "Moreover, ye shall take no redemption for the person of a murderer, who is guilty of death"? you may say that from this very verse it may be inferred that no redemption money is to be

taken for a *murderer*, but redemption money is to be taken for one who destroys such members of the body as cannot grow on again.

We have learned in a Boraitha: R. Simeon b. Johi said: "Eye for eye" means its value. You say, its value. Perhaps it means literally? Nay, for what should be done when a blind man blinds another, etc.—how should be fulfilled the commandment "eye for eye"? And lest one say that such a case is an exception, therefore the Scripture reads [Lev. xxiv. 22]: "*One* manner of judicial law shall ye have"; from which is to be inferred that it means a law which can be applied alike to all human cases.

In the school of R. Ishmael it was taught: The Scripture reads [ibid., ibid. 20]: "So should it be given* unto him"; and by "given" is meant a thing which is given from hand to hand. If so, how are the preceding words in the same verse to be explained? "In the manner he should *give* a bodily defect," etc. (hence the word "give" is used also for such a thing as is not given from hand to hand)? It may be explained thus: The school of R. Ishmael deduce it from a superfluous verse, thus: Let us see. It reads already in the preceding verse [ibid. 19]: "And if a man cause a bodily defect in his neighbor; as he hath done, so shall it be done unto him." Why, then, the repetition in verse 20? To indicate that it means money. But still the above-stated objection as to the use of the word "give" in the beginning of the verse remains? Because at the end of the verse the Scripture desired to use a term from which it should be deduced that it means *money*. It used the same expression also here.

The school of R. Hyya deduce it from the following: The Scripture reads [Deut. xix. 21]: "Hand for hand" †—that means something that can be passed from hand to hand, *i.e.*, money.

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* The verse reads: "Yithain . . . Kain yinothen," of which the literal translation is "should give . . . so should be given"; and the Talmud takes it as it is, and infers from this that the expression "give" means money, which is given from hand to hand. The preceding verse (19), however, reads: "Osso . . . Yeosseh," the literal translation of which is, "did . . . should be done." Leeser translates in both instances "done," according to the sense.

† The Gemara continues with similar questions: Is it not written, "foot for foot"; and similar answers, "There is a superfluous verse," etc., are given. It also proceeds to cite other schools and individuals who deduce it from other Scriptural sources, with a lengthy discussion, and finally arrives at the same conclusion, that this law must not be understood literally. We have omitted all this, as all the explanations are as complicated as the one translated in the text. And it seems to us

It happened that an ass bit off a child's arm. When the case came before R. Papa b. Samuel he said: Go and appraise the sum to be paid for the four items. Said Rabha to him: But we have learned that *five* items are appraised? He answered: I mean in addition to the actual damage. Said Abayi: But this was an ass, and an ass pays actual damage only? He then said: Go and appraise his actual damage. But he must be appraised as if he were a slave? He answered: Go and appraise him as such. Said the child's father: I do not want to submit to such an indignity. He was told: This money belongs to the child (and you cannot deprive him of that). The father then answered: When he shall grow up, I will rather pay him of my own.

It happened that an ox lacerated the arm of a child, and the case came before Rabha. He said: Go and appraise the actual damage as if he were a slave. His disciple said to him: Are not you, master, the one who said that all appraisements which are made as of a slave are not to be collected in Babylon? He answered: The appraisement may be made, so that in case he should subsequently seize some property of the defendant he will not be compelled to return it. And Rabha in this decision follows his theory elsewhere: "Damages of an ox caused to him by another ox, or damages of an ox caused by a man, are to be collected in Babylon, but damages of a man caused to him by another man, or by an ox, are not to be collected in Babylon." Why are the latter damages not collected? Because it states [Ex. xxii. 8]: "Before the judges," etc., and in Babylon the majority of the judges are not ordained, is it not the same with damages caused by one ox to another, etc.—for they are all mentioned together in the Scripture, where the word "Eloim" is written, which means ordained judges? Rabha speaks of a case when it was caused by the tooth or foot, which are considered vicious from the beginning, and such damage is at any rate to be collected in Babylon.

"*Pain—if he burned him*," etc. Who is the Tana who holds that pain without damage must be paid for? Said Rabha: It is Ben Azai of the following Boraitha: Rabbi said: "Burning" is mentioned in the Scripture first. Ben Azai said: "Bruise" is

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that all those who participated in this discussion well knew that at the time the Thora was given the law was literal in its meaning, as it was also at that time among other nations; but with the change of time it was positively necessary to change this law, and if it could not be deduced from the Scripture it would not be accepted.

mentioned first. (How is it possible that they should differ as to which is written first and which last, when the verse [Ex. xxi. 25] reads plainly "burning" first and "bruise" last?) The point on which they differ is whether "burning" without producing a bruise is considered pain which is to be paid for: Rabbi says that the word "burning" could be explained to mean without a bruise, and the word "bruise" mentioned last is only to explain that burning without a bruise is not to be considered. Ben Azai, however, maintains that "burning" means with a bruise; and because "bruise" is repeated again, it may be inferred that when it happened that the burning was without a bruise it is also considered pain which must be paid for. R. Papa opposed: On the contrary, common sense would dictate that Rabha's statement, "Burning is mentioned first," means to say that because usually burning is accompanied with a bruise it is also considered pain and must be paid for; and Ben Azai's statement that bruise is mentioned first means to say that "bruise" is the main point, as burning without a bruise is not considered at all. It may also be explained that both agree that the word "burning" means with or without a bruise, and the point of their difference is: Given a general and a particular which do not follow one after the other (*e. g.*, in the verse in question, where the words "wound for wound" intervene between them), Rabbi holds to the rule "that a general includes nothing but what is stated in the particular" does not apply to such a case, while Ben Azai holds that it does. And lest one say: If "burning" includes also a bruise, why, then, the repetition? Say that the word "bruise" means to increase the payment.

"*It is appraised how much one would*," etc. When the damage is paid for, how should the pain be appraised separately? Said the father of Samuel: It should be appraised how much one would pay to have his arm, which by the decree of the government must be amputated, severed by a drug* instead of a sword. If so, it ought to state "give" instead of "take"? Said R. Huna b. R. Juhoshua: It means that the plaintiff shall take from the defendant what such a man would give.

"'*Healing.'—If he caused him bodily injury*," etc. The rabbis taught: If pus collected by reason of the wound and the wound broke out again, he must heal him; and he must also pay for the loss of his time until he shall be healed again. If, however, not

* It probably means the use of a drug as an anodyne or anæsthetic during the amputation.

by reason of the wound, he is free from both. R. Jehudah said: Even if it was by reason of the wound, he must cure him only, but not pay again for the loss of time.

The sages, however, say that the healing and the loss of time go together: When he must pay for one, he must also pay for the other, but not for one without the other. What is the point of their difference? Said Rabba: I found the disciples of the college sitting and declaring that the rabbis and R. Jehudah differed as to whether a wound might be bandaged or not (*i. e.*, whether the injured person is permitted to increase the expense of healing by bandaging up his wound and thereby causing high temperature, which produces pus). The rabbis hold that it may be bandaged at the expense of the defendant as regards both healing and loss of time. R. Jehudah, however, holds that it may not be done. But if he does so, for healing, which is plainly written in the Scripture (*thoroughly* healed), he must pay; but for loss of time, for which there is no additional word in the Scripture, he must not pay. Said I to them: If we should come to the conclusion that a wound may not be bandaged, even healing would not have to be paid for. We must therefore say that all agree that a wound may be bandaged; but they differ, if bandaged too much (and this caused high temperature and produced pus), as to who must suffer the increased expense. R. Jehudah holds: That as one must not bandage a wound more than necessary, he is only obliged to pay for healing, because the Scripture insists on it by the repetition of the word "healing"; but regarding the loss of time, about which there is no repetition in the Scripture, he has not to pay for it. The first Tana, however (of the above-mentioned Boraitha), holds that because he must pay for the increased healing, for the reason stated above, he must also pay for the increase in loss of time, which is equal to healing in all respects.

(Let us see:) According to the rabbis, who hold that he who is liable for loss of time is also liable for the expense of feeling, and he who is not liable for loss of time is not liable for the expense of healing, wherefore the repetition of the word "healing" in the verse?* It is needed for what the following Boraitha states: "R. Ishmael said: It is written [Ex. xxi. 19]: *Thoroughly healed*," from which is to be inferred that a physician is permitted to heal (although the affliction came from Providence).

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* The word "healing" is repeated in the text. Leeser translates it "thoroughly healed"; literally, it would be, "concerning healing he should be healed."

The rabbis taught: Whence do we know that if pus collected by reason of the wound and the wound broke out again he must heal him, and also pay for the loss of time? From [ibid., ibid.]: "Only he shall pay for his loss of time, and shall cause him to be thoroughly healed." Lest one say that it is so also if the pus collected not by reason of the wound, therefore it reads *only*. R. Jose b. Jehudah said: The above word "only" excludes the case when it collected even by reason of the wound.

The Master said: "Lest one say," etc. If not by reason of the wound, why was there a verse needed? The expression in the Boraitha "not by reason," etc., may be explained as stated in the following Boraitha: If he disobeyed the prescription of the physician and ate honey or other saccharine substances, which are injurious to a wound, and a cancer formed, shall he also be liable to heal him? Therefore it is written *only*.

If the defendant should say, "I will cure you myself," the plaintiff may object, saying: "I fear you as a lion lying in wait." And if the defendant should say, "I will get you my relative, a physician, who will cure you for nothing," he may say: "A physician who cures for nothing is worth nothing." And if he should offer to get a physician who lives at a distance from the plaintiff, the latter may object, saying: "One may get blind before seeing him." And also, conversely, if the plaintiff should demand money to heal himself, the defendant may answer: "You may not comply with the directions of the physician, and thus defer the time of the healing." And if the plaintiff should demand from the defendant to agree upon a fixed sum, the defendant may also object, saying: "You may take the money and not cure yourself, and people will call me 'a vicious ox.'"

It was taught above: "And all those are paid where actual damage is paid." Whence do we deduce this? Said R. Zbid in the name of Rabha: The Scripture reads [Ex. xxi. 25]: "Wound for wound," which means that pain is to be paid for where actual damage is paid. But is this verse not necessary to make an unintentional act equal to an intentional one, and an accidental one equal to a voluntary act? If so, let the Scripture read "wound *by* wound"—why "wound *instead* of a wound"? (See supra, p. 54.) To infer both. R. Papa, however, said in the name of the same: There is a repetition as to healing [ibid., 19], to add healing where actual damage is paid. But can there be a case where one should be liable for all the four things where no actual damage was done? Yea. Pain—as is stated in the Mishna:

"If he burned him with a spit or a nail," etc. Healing—as, for instance, when he had a slight wound and it was healing up, and from the medicines applied the skin turned white, and other medicines had to be applied to restore the natural color. Loss of time—when he must be confined to the house. Disgrace—when he spat in his face.

"*Loss of time*," etc. The rabbis taught: "Loss of time. He is considered as if he were a watchman of a pumpkin field; and lest one say that no justice is done in such a case, for should he be cured he could still do some kind of manual work, or serve as a messenger and get better compensation? There is no injustice, because he has already received the value of his limb."

Rabba said: If one cut off another's hand he pays him the value thereof; and as regards loss of time, it is appraised as if he were a watchman of a pumpkin field. If one breaks another's leg, he pays the value thereof; and as regards loss of time, it is appraised as if he were a doorkeeper. If one blinds another's eye, he pays him the value thereof, and the loss of time is appraised as if he were a miller. If, however, he makes him deaf, he pays the value of his whole body, for he is not fit for any work.

Rabba questioned: In case one cut off another's hand, broke his foot, blinded his eye, at intervals, and each injury was not appraised separately when it occurred, and finally he made him deaf, how shall the appraisement be made? Shall we assume that the appraisement for the deafness will be sufficient, as he has to pay him for the whole body, or each of the injuries must be appraised separately, and the difference would be that he would receive compensation for the pain and the disgrace of each injury separately? I do not question as regards actual damage, healing, and loss of time, for each of which he has not to receive separately, as he receives now compensation for the whole body as if killed, but for the pain and disgrace suffered with each injury? Another question: How is it if each injury was appraised, but the money was not yet collected? Shall we assume that because it was appraised separately each must be paid; or, because he has not yet paid and now he has to pay for the whole body that all the previous appraisements are included therein? Both questions remain undecided.*

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* The codifiers of the Halakhoth, as the Alphasi, Maimonides, etc., have decided in accordance with the rule that all undecided questions found in the Talmud must be decided rigorously; *i. e.*, that in both of the above cases the defendant pays for each injury separately and then for the whole body.

Rabba questioned: If one strikes another and makes him temporarily unfit to labor, as, for instance, when he strikes him on the hand and it gets swollen, which will pass over, shall we assume that because he will recover he need pay him nothing, or perhaps for the time during which he is incapable to work he must pay? Come and hear: "One who strikes his father or mother, but makes no bruise, and one who wounds his neighbor on the Day of Atonement, is liable to all the five things." Does the first part of this Boraitha not mean a case like the one questioned by you; *i. e.*, that he struck them on the hand, which will soon pass over, and still it states that he must pay all? Nay, it may be explained that he caused him deafness, but makes no bruise. But did not Rabba say that one who causes deafness to his parents is to suffer the death penalty, for deafness is impossible without a bruise, which is a drop of blood that falls into the ear? Therefore the Boraitha must be explained that he shaved off his hair. His hair? It will surely grow on again, and this is Rabh's question (as there is no difference whether the hand will recover or the hair will grow on again?) It can be explained that the Boraitha meant that he applied a depilatory which prevents the hair from growing on again. Pain—because the depilatory entered the grooves (of his head) and caused him pain. Healing—because the pain must be allayed by medicine. Loss of time—as for instance when he was a professional buffoon who shows different grimaces and gesticulations, and he is prevented from doing so on account of that. Disgrace—there can be no greater disgrace than to be without hair.

And this matter, in which Rabba was doubtful, was certain to Abayi in one way and to Rabha in the opposite way, as it was taught: If he strikes him on his hand, which gets swollen, Abayi says he must pay both the value of his hand in his trade during the time of his sickness and also the loss of time in such labor as he could do without the hand. Rabha, however, says he is paid only what he loses every day by not working. It was taught: One who cuts off the arm of his neighbor's Hebrew servant; Abayi says he pays the value of the arm to the servant and for the loss of time to his master. Rabha, however, says: The whole must be paid to the servant, who should buy therewith land, the usufruct of which should belong to the master. It is certain that where the injury is wholly to the slave, *e. g.*, where he split his ear or his nostrils (which does not prevent him from work), that all that he gets belongs to him; but where the injury is of such a

nature that he cannot do any work, the difference between Abayi and Rabha concerning the loss of time remains.

"*Disgrace,*" etc. Our Mishna is in accordance with R. Simeon of the following Boraitha only: "All those who sustain injury are looked upon as if they were independent men that became poor, as all Israelites are the children of Abraham, Isaac, and Jacob. Such is the dictum of R. Meir. R. Jehudah says: It is according to his rank and station. R. Simeon, however, says: The rich ones are looked upon as if they were independent men who became poor; the poor ones, as if they were the very poorest class." Hence our Mishna, which states that it is according to the station of the party, is not in accordance with R. Meir, who makes no difference, nor according to R. Jehudah, who says further on that a blind person gets nothing for being disgraced, but according to R. Simeon only (who considers rank and station).

According to whom is the following Boraitha: "The rabbis taught: If he intended to disgrace a small one and disgraced a big one, he pays the big one the amount he would have to pay the small one. If he intended to disgrace a slave and he disgraced a freeman, he pays to the freeman the amount he would have to pay to the slave"? It seems to be in accordance with neither of the Tanaim mentioned above. [At the first glance, the Boraitha is to be explained that "small one" means one who is poor in estate, and "big one" means one who is rich in estate, and therefore it is not in accordance with R. Meir, to whom all are equal, nor according to R. Jehudah's theory, who holds no disgrace is paid for to slaves, and, finally, not according to R. Simeon, who holds that no disgrace is paid for unless it was caused to him who was intended. Why so? Because R. Simeon equals it to murder, of which it is written [Deut. xix. 11]: "And he lie in wait for *him,*" etc.; and we find also, as regards disgrace [ibid. xxv. 11]: "And *putteth forth her* hand" (which means intentionally), hence in both intention is required.] It may be explained even in accordance with R. Meir, and the terms "small" and "big" should be taken literally: a grown person and a minor. But is, then, a minor paid for disgrace? Yea, as R. Papa said elsewhere, if the minor is of such understanding that he feels ashamed when one says to him, "Be ashamed of yourself," disgrace is paid for to him.

MISHNA *II.*: One who causes disgrace to a nude, blind, or sleeping person is liable; if, however, one causes disgrace when

asleep, he is free. If one falls down from a roof and causes damage and disgrace, he is liable for the damage but not for the disgrace, as the latter requires intention.

GEMARA: The rabbis taught: "If he disgrace a nude person, he is liable; but still, the disgrace caused to a nude person is not equal to that caused to a dressed one. If he disgrace him in a bath-house, he is liable; but still, such disgrace is not equal to that caused to one in the market." The Master said: "If he causes disgrace to a nude person," etc. If he walks nude in the street—is, then, such a person capable of being ashamed? Said R. Papa: As for instance when a wind rolled up his clothes somewhat, and the defendant rolled them up more and thereby caused him shame. "In a bath-house." Is, then, a bath-house a place for claiming for disgrace? Said R. Papa: It means that he caused him shame while on the banks of a river.

R. Aba b. Mamel questioned: If one causes shame to a sleeping person who subsequently dies while asleep, what is the law (as to the payment for shame)? On what point is the question? Said R. Zbid: It is thus: Is shame paid for, for hurting one's feelings, and here, when he dies while sleeping, his feelings are not hurt, or it is only a fine for the indignity of one in the presence of others, and here was such indignity? Come and hear: "R. Meir says: A deaf-mute, and a minor, disgrace is paid for to them, but not to an insane person." Now, then, if it is a fine for the indignity, it is correct that a minor be also paid, but if for hurting the feelings, has a minor, then, feelings of shame? But even if it is for indignity, why should an insane person not be paid for? Insane? is there any greater shame than this?

R. Papa says: The point of the question is thus: Is the reason because of the hurting of his own feelings—here, when he dies when sleeping, there was none—or because of the feelings of the family? Come and hear, etc. (the Boraitha just quoted). Now, then, if for the sake of the family it is correct that it states also a minor, and if for his own, is, then, a minor capable of feeling shame? But even if it is because of his family, it is not correct that an insane person shall not be paid for? There is no greater shame for a family than the insanity of one of its members. Be this as it may, let it be inferred that the reason is because of his family; for if because of his own feelings, the minor stands in the way? Said R. Papa: A minor is sometimes paid for shame if he is of such understanding that he feels ashamed when one says to him: "Be ashamed of your-

self!" We have also so learned plainly in a Boraitha: "Rabbi says: A deaf-mute has, an insane person has not, but a minor sometimes has and sometimes has not, feelings of shame, as explained above."

"*One who disgraces a blind one,*" etc. Our Mishna is not in accordance with R. Jehudah of the following Boraitha, who says: "A blind person has no feelings of shame; so also he used to free him from banishment, stripes, and death punishment by the court." What is the reason of R. Jehudah's theory? He deduces it from the analogy of expression "the eye," which is used in speaking of disgracing a person and also in speaking of collusive witnesses: as in the case of collusive witnesses blind persons are excluded (for if they cannot see they cannot testify). And regarding banishment, as it is stated in the following Boraitha: It is written [Numb. xxxv. 23]: "Without seeing him" (which is to be explained that *here* he has not seen, but he is capable of seeing), which excludes a blind person (who can never see). Such is the dictum of R. Jehudah. R. Meir says: (On the contrary,) it includes a blind person. What is the reason of R. Jehudah? It is written [Deut. xix. 5]: "And he that goeth into the forest with his neighbor to hew wood." Should we assume that this includes even a blind one? Therefore the Scripture says, "without seeing him," to exclude him. And R. Meir? (He may explain it thus:) The Scripture reads "without seeing him," to exclude something, and it is written [ibid., ibid. 4], "without knowledge," which also means to exclude something; and there is a rule that where there is one exclusion after another it means to include. Hence it includes the blind. R. Jehudah, however, maintains that "without knowledge" means to exclude the one who does it intentionally (who is guilty of a crime). "From death by the court." It is deduced by analogy of the expression "murderer" used here and in case of banishment. (In case of one killing a person the expression "murderer" is used [Numb. xxxv. 31], and so also in case of banishment.) "From stripes." It is deduced by the analogy of the expression "Rosha" [ibid. xxv.] (the wicked, the guilty one) used here, and in case of death by the court [Numb. xxxv. 31].

We have learned in another Boraitha: "R. Jehudah says: A blind person has no sense of shame. He also relieved him from the performance of all the commandments contained in the Scripture." Said R. Shesheth b. R. Idi: What is the reason of

his statement? It is written [Deut. vi. 1]: "And this is the commandment, with the statutes and the ordinances"—from which is to be inferred that only those who can be ordained as judges have the obligation of observing the commandments, but not those who cannot be ordained (and as a blind person cannot be ordained a judge, he is exempt).

R. Joseph said: First I used to say: If there should come one and tell me that the Halakha prevails according to R. Jehudah, who says that a blind person is exempt from the performance of commandments, I shall make a feast for the rabbis, because I, who am under no obligation to do so, still do perform them; but since I heard of what R. Hanina said, that there is more reward for him who performs a commandment which he has an obligation to than for him who performs it without such obligation, I changed my mind, and I say that I shall make a feast if one should come and tell me that the Halakha does not prevail according to R. Jehudah; for if I am required to perform the commandment, the reward will be greater.

MISHNA *III.*: The law is more rigorous in regard to a man than in regard to an ox in this respect, that a man pays the five certain items, and also the value of the aborted children, while an ox pays only for actual damage and is free also from paying for the aborted children. One who assaults his father or mother, but does not bruise them, and one who wounds another on the Day of Atonement, is liable to pay all the above items. One who wounds a Hebrew servant is liable to pay all, but for loss of time when he is his own. One who wounds a heathen slave of another is liable to pay all. R. Jehudah says: There is no disgrace to slaves. A deaf-mute, an insane person, and a minor, one who meets with them is in a bad position, for the one who wounds them is liable, while if they do so to others they are free. The same is the case with a slave and a (married) woman, with the difference that they must pay when they become independent; namely, when the woman is divorced and the slave is liberated. If one, however, assaults his father or mother and bruises them, or, on the Sabbath, any person, he is free from payment of the above-enumerated items, for he is guilty of a capital punishment. One who wounds his own heathen slave is free from everything.

GEMARA: R. Elazar questioned Rabh: One who wounds the minor daughter of another, to whom is the compensation to be paid? Shall we assume that as the Scripture granted the

income of a minor daughter to her father, the same is the case with the compensation for a wound inflicted upon her, for her value is diminished thereby; or perhaps the Scripture granted him only the income so far as she is under his control; for instance, if he wanted to marry her to one afflicted with scabies he could do so, but as to wounding, if he himself wanted to wound her he must not do so; hence it is an income which is not under his control, and therefore he does not acquire title to it ? He answered: The Scripture granted him only the income first stated.

He objected to him from our Mishna: " But for the loss of time when he is his own ?" (Hence we see that the loss of time is considered; and as the income from the labor of a minor daughter belongs to her father, he shall at least collect for the loss of time ?) Said Abayi: Rabh concedes, as far as this is concerned, that her father gets it up to the age when she becomes *vigorous*. He objected again from the following: " One who wounds his grown son, he pays him at once; if he wounds his minor son, he makes an investment with the money he has to pay; if he wounds his minor daughter, he is free; and not only he, but even if others have done so to her, the father gets the payment ?" He answered: This also has reference to loss of time only.

There is a contradiction to the above statement that in case of a grown son he pays him at once, from the following: One who wounds another's children—if they are grown persons, he pays them at once; if they are minors, he makes an investment with the money due; if his own children, he is free ? This presents no difficulty: The one case treats of where he provides their board, and the other case treats of where he does not. Now, let us see: You interpret the first Boraitha that it treats of where he does not provide their board; then the last part of same: " If one wounds his minor daughter, he is free, and if others do so to her the payment belongs to him," also treats of where he does not provide her with board—why, then, should the payment belong to him ? must she not pay for her board ? As Rabha b. R. Ula explained elsewhere that it refers to that part which is in excess of what she needs for her board, so also is it to be explained here, that it relates to the excess. If so, then the second Boraitha treats of where the father does provide their board—why should they get the payment ? does it not belong to the father ? It may be said that one is particular only

about money of his own pocket, but about an income that comes from the outside one is not particular.

But is, then, a found article not an outside income, and still one is particular about it? An outside income which comes without any pain to the body, one is particular about; but an income which comes by reason of a wound, where she suffers bodily pain, is different. But does not the Boraitha state that if others wounded her they must pay to her father? It may be said that, as the Boraitha was interpreted that the children were not on his board, it is to show that the man is so penurious that he does not even provide board for his children, and such a man is certainly particular even about such an income; but in our case, where it is explained that they are on his board, it may be assumed that he is not particular about such an income.

What kind of investment (mentioned in the above Boraitha) should he make? R. Hisda said: He should buy with the money the Holy Scrolls. Rabba b. R. Huna said: (An article which brings benefit, *e.g.*) a date-tree, the benefit of the fruit of which should belong to the minor.

And Resh Lakish is also of the opinion that the Scripture granted to the father only the benefit derived from the labor of a minor daughter. R. Johanan, however, says: Even the money gotten for a scratch. A scratch? How can this enter the mind? Even R. Elazar questioned only in case of a wound, because her value was reduced; but in case of a scratch, which does not reduce her value, he did not question at all? Said R. Jose b. Hanina: The case is that the scratch was on the face, and in such a case it causes a reduction in her value.

"*A heathen slave*," etc. What is the reason of R. Jehudah's theory? Because it is written [Deut. xxv. 11]: "When men strive together, one with his *brother*," * which signifies one with whom there can be a fraternity, excluding a slave. The rabbis, however, maintain that the word "brother" can also mean a slave, as there is a fraternity with a slave, because he is obliged to perform many commandments which an Israelite is obliged to perform. Now then, according to R. Jehudah, who is particular about the word "brother" mentioned in the Scripture, let witnesses who were found collusive in their testimony against a slave (to convict him of a crime punishable by death) not be

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* The text reads "Ish v'ochiv," which literally means "a man and his brother." Leeser, however, translates it according to the sense, "one with the other."

put to death, for it is written [ibid. xix. 19]: "Then shall ye do unto him as he had purposed to do unto his *brother*"? Said Rabha in the name of R. Shesheth: The verse reads [ibid., ibid.]: "And thou shalt put away the evil from the midst of thee," which means under any circumstances.

Now, according to the rabbis, who maintain that a slave is also considered a "brother," let a slave be qualified to become a king? According to such a theory the same question could be put as regards a proselyte (who according to all is named brother, and nevertheless he is not qualified)? But both are excluded by the following verse [ibid. xvii. 15]: "From the midst of thy brethren shalt thou set a king over thee," which signifies from the best qualified of your brethren. The question can, however, be put thus: Let, according to the rabbis, a slave be eligible as a witness, for it is written [ibid. xix. 18]: "He had testified a falsehood against his brother"? Said Ula: Even as regards witnesses he must be excluded by the following *a fortiori* argument, thus: An Israelitish woman is not eligible as a witness—a slave, who is not an Israelite and cannot even intermarry with an Israelitish woman, is it not logical that he should not be eligible as a witness? And if you should say that a slave has the preference, for he is circumcised, which is not the case with a woman, the case of a minor can prove it, who is circumcised, and still he is ineligible as a witness; and if you should say that a minor has no obligation of performing commandments, while a slave has, the case of the woman can be cited who has such obligation and still she is ineligible as a witness, and the former argument will be reinstated; from which it is to be seen that in some respects one has preference and in others the other has preference. In one thing, however, they are all equal, in that they are not fit to perform all the commandments to which an Israelite is subject and they are eligible as witnesses; the same is the case with a slave, who is not fit to perform all the commandments and is also eligible as a witness.

"*A deaf-mute*," etc. The mother of R. Samuel b. Aba of Hagrunia married R. Aba, and she transferred her estates to her son R. Samuel. When she died, he went before R. Jeremiah b. Aba and he installed him in the possession of the estates. His stepfather went and told this to R. Hoshiya, who in his turn told it to R. Jehudah, and the latter said to him: So said Samuel: A woman who sells her estates to some one with a condition that her husband shall have the fruition of same during

his lifetime, and thereafter she dies, her husband can recover the estates from the buyer (for he inherits from his wife, and because he had the usufruct of the estates he is considered as if he were the first buyer). When this was stated before R. Jeremiah, he said: I, however, know of a Mishna (Third Gate, Chap. VIII.) which states: "One who transfers his estates to his son, after his decease . . . If the son sell them, the buyer has nothing in them until the father dies." We see, then, that if the father die the buyer acquires title in them, and even in case the son dies when the father is still alive, in which case they never came into the possession of the son. As R. Simeon b. Lakish said, there is no difference whether the son dies during the lifetime of the father or the father dies during the lifetime of the son, in both of which cases they never came into the possession of the son, the buyer nevertheless acquires title.*

When the answer of R. Jeremiah was repeated before R. Jehudah, he said: So said Samuel: This is not equal to the case of our Mishna. Why so? Said Abayi: On account of the enactment of Usha, which is in accordance with Samuel's statement. (See Khethuboth, p. 20.) Said R. Idi b. Abin: We have so also learned in the following Boraitha: If witnesses say: "We testify that that person divorced his wife and paid her the amount of her marriage contract," and it was found that she was still with him, and cohabited with him, and those witnesses were found collusive, they must not pay the full amount of the marriage contract (because she may die before her husband and nothing will be collected, but it must be appraised how much she would get in cash now if she should transfer her right in the marriage contract, so that if she should die before her husband the buyer would lose), but only the benefit of the same; and if she dies, her husband inherits also this from her. Now then, if the enactment of Usha should be of no effect, why should her husband inherit the amount of her marriage contract—let her be able to sell her right in the marriage contract and collect the full amount of it? Said Abayi: What comparison is this: If the enactment was made regarding a woman's estate which she sells reserving the benefit, should the same enactment apply to guaranteed estates?

Said Abayi: As we have come to speak about benefit, let

* Here follows a discussion as to whether the usufruct is equivalent to the principal, which is omitted here, but will be translated in its proper place.

us say something regarding it: The above-mentioned benefit belongs to the wife; for if it should belong to the husband, let the collusive witnesses say to her: What loss did you sustain—if you had sold them, the benefit would anyhow have belonged not to you, but to your husband? Said R. Shalman: It does not matter: This benefit, although it would go to the husband, would be a benefit for her, as it would be used to increase the luxury of the household.

Rabha said: The Halakha prevails that the benefit in case of a woman who sells her right in the marriage contract belongs to herself; and if she bought estates therewith, her husband has nothing even in their income. Why so? The rabbis enacted that he should have the direct income of his wife's estates belonging to her before marriage, but not the income of her estates which she acquired after her marriage in which her husband has no share (*e.g.*, estates bought with the money paid her for disgrace caused to her, etc.). When R. Papa and R. Huna returned from Rabh's college, they questioned: On account of the enactment made in Usha, it was taught of a slave and a woman, one who meets with them is in a bad position, etc. Now, if the enactment of Usha should be of no effect, why should the compensation for her wound be paid to her husband, let it be paid to her and let her buy estates the usufruct of which shall belong to her husband? (What question is this?) Even according to the theory that the enactment of Usha is of effect and she cannot sell the right in her marriage contract absolutely, let her sell, however, her estates of which her husband has the fruition for any benefit she could derive and pay to him whom she wounded? We must then say that she does not possess any. The same is the case here.

MISHNA *IV.*: If one blow* into the ear of another, he pays one sela (as a fine for the disgrace he caused him). R. Jehudah, however, in the name of R. Jose the Galilean says, one manah. If he strike him with the palm of his hand on the cheek, he pays two hundred zuz; if, however, with the back of his hand, he pays four hundred. If he pull or cut his ear, or pull his hair, or spit in such a manner that the spittle fall on him, or strip him of his garment, or he bare the head of a woman in the market, four hundred zuz is to be paid. This is the rule:

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* According to others, it means "boxing the ear." We, however, have translated it in accordance with our method, after the second interpretation of Rashi.

Rank and station of the parties are taken into consideration. R. Aqiba, however, says: Even the poorest of Israel must be considered as if they were independent men who had lost their estates, for they are the descendants of Abraham, Isaac, and Jacob. And it happened that one bared the head of a woman in the market, and when the case came before R. Aqiba he imposed a fine of four hundred zuz. Said the defendant to him: "Grant me time for payment," and he did so. The defendant then watched her when she was standing at the gate of her courtyard, and broke her pitcher containing oil of the value of one issar: she bared her head, dipped her hand in the oil, and rubbed it into her hair in the presence of witnesses. The defendant then brought the witnesses before R. Aqiba and said: Rabbi, do you command me to pay this woman four hundred zuz? R. Aqiba answered: Your pleading is of no avail, for one who wounds himself, although it is considered a crime, he does not pay a fine, but if others wound him he must be paid. The same is the case with one who cuts off his plants; although it is unlawful, still he pays nothing, but if others do so (to the same property) it must be paid for.

GEMARA: The schoolmen propounded a question: The manah stated in the Mishna, does it mean a manah of the city of Zur,* which contains one hundred zuz, or does it mean the manah of the country, which is one-eighth part of it? Come and hear: "It happened that a man blew into the ear of another and the case came before R. Jehudah the Second, and he said: I saw you doing it, and I hold with R. Jose the Galilean; and there are also other witnesses who saw you doing it, therefore go and pay him a manah of the city of Zur." † There was a man who did so to his neighbor, and when the case came before R. Tubiah b. Mathna he sent a message to R. Jose, questioning him whether the sela mentioned in the Mishna meant a sela of Zur or one of the country, which is only of the value of one-half of a zuz, and he answered: This is to be inferred from the end of Mishna I., Chap. IV., where it states "the first two a golden dinar"; and if the Mishna treated of a sela of the country, it would state one more case, viz.: "If the ox still gore another ox worth two hundred zuz, the owner of the ox and the owner

* One manah of Zur is 25 selas, each sela containing four zuz. A country manah is one-eighth of a manah of Zur, and also contains 25 selas, so that a country sela is one-half of a zuz.

† From here to end of paragraph is transferred from Chap. IV., Text, 36*b*.

of the first ox that was injured take each twelve dinars and one sela." Said R. Tubiah: Should the Tana enumerate all the possible cases as a peddler does his wares? How was the case decided? It was decided from the statement of Rabh, which R. Jehudah said in his name, that all the moneys mentioned in the Scripture mean those of Zur, and those mentioned by the rabbis mean those of the country. (Hence one-half of a zuz.) Said the plaintiff: As I have to get only one-half of a zuz, let it be for the poor, as I do not want it. Thereafter he said again: Give it to me and I will use it for improving my health. Said R. Joseph to him: The poor have already acquired title to it, and although they were not here, we the treasurers of charities are considered the hand of the poor.

Hanan the Bisha (the bad) blew into the ear of another. When the case came before R. Huna, he said: Go and pay him one-half of a zuz. Hanan had in his possession a bad zuz that he could not pass, and he tendered it to the plaintiff, asking for one-half zuz change. When he refused, he blew in his ear again, and paid him the whole zuz.

(It is said above, " I saw you doing it.") May a witness be a judge in the same case? Have we not learned in a Boraitha: If the Sanhedrin saw one murdering another, they shall be divided; viz., some of them shall appear as witnesses and the others shall perform the function of judges. Such is the dictum of R. Tarphon. R. Aqiba, however, said: As they are all witnesses, none of them can perform the function of judges? Did R. Aqiba indeed say so? Have we not learned in another Boraitha: It is written [Ex. xxi. 18]: "And if men strive together, and one smite the other with a stone, or with the fist." Said Simeon the Timani: As in the case of the fist it must be investigated whether the blow of the fist was of such violence as to make him ill, confined to his bed, the same is the case with the stone; but if the stone was lost from the hand of the witnesses, no judgment can be granted. Said R. Aqiba to him: "Did he strike him in the presence of the court, so that they could testify how much, for what, and at what place he struck him; and secondly, in case one pushes his neighbor from the top of the roof of a house or palace and he dies, are, then, the court obliged to go and investigate if the height was such as to kill a man, or shall the house or palace be brought before the Beth Din? And if you should say, 'Yea,' how should be the case if in the meantime the palace were destroyed—shall we

wait until it be rebuilt of the same height, so that it can be measured? Therefore we must assume that as in the case of the fist (which is always there) it depends upon the testimony of the witnesses whether the blow was of such violence, etc., the same is the case with the stone, except where the stone was lost before the witnesses have seen it." We see, then, that R. Aqiba said that the court can testify how the striking was, hence that a witness can act as judge? He said it only to R. Simeon: According to your theory, should the court, etc., but he himself does not allow a witness to be a judge under any circumstances.

The rabbis taught: "A non-vicious ox who killed a man and has also caused damages to another, he must be tried for the crime but not for the damages (because a non-vicious ox pays for damages from his body, and in this case his body is to be stoned); a vicious one, however, who did the same is tried first for the damages and subsequently for the crime. If, however, he was sentenced to death first, he cannot be tried again for the damages." What is the reason? Why shall he not be tried again for the damages. (In such a case the payment is to be made from the estates of the owner?) Said Rabha: I found the disciples of the college sitting and discussing about this case, and they came to the conclusion that the Boraitha is in accordance with R. Simeon the Timani's theory, that in all cases the appraisement of the court is necessary also concerning damages; and in our case, as it was already decided that the ox must be killed, the execution must not be postponed for the purpose of appraisement. Said I to them: The Boraitha can be explained also in accordance with R. Aqiba, namely, that the case was that the owner of the ox ran away (and he cannot be tried when he is not present). If so, even if the ox was not first tried for the crime, can a civil case be tried in the absence of the parties? The case was that he ran away after the witnesses testified in his presence. But if he ran away, from whom shall the payment be collected? If he was not yet tried for the crime, the appraisement of the damages can be made and the ox may be hired to do work with him until the compensation for the hire equals the amount of the payment, and subsequently he shall be tried for the crime. If so, let also a non-vicious ox be tried for the damages and then hired until the hire shall equal the amount of damages, and thereafter he shall be tried for the crime? Said R. Mari bar Kahana: From the fact that it does not state so,

it may be inferred that the hire paid for an ox is not considered as its body, but as the estates of the owner.

The schoolmen propounded a question: Is investigation (before appraisement) necessary in case of damages, or not? Shall we assume that only in case of a crime it must be investigated whether the blow was enough to kill, but in case of damages he must pay at any rate, or there is no difference and investigation must be had? Come and hear: It is stated above (p. 118), "As a pit of ten spans depth, which is capable of killing, so also other things, etc. If, however, it was less deep, he is liable only for damages but not for killing." Is it not to be assumed that it means from the bottom to the top—namely, ten spans deep is for killing, less than ten is for damages? Hence we see that investigation is not necessary, as it must be paid even if it was only two or three spans? Nay, it means from the top to the bottom—namely from one up, but not including ten, is investigated for damages, but it must be investigated how many spans deep are necessary for such damage (but if it was ten or more, then we follow the tradition that from ten up it kills).

Come and hear: Concerning the five certain things it must be investigated, appraised, and collected at once, including healing and loss of time, which are also previously appraised as how long it will take before he will be cured. If, however, it was not so—for instance, during that time he grew worse, or, on the contrary, he was cured in a shorter time, it does not matter, and the appraisement remains the same. Infer from this that there is appraisement in damages. (From this the question of the above schoolmen cannot be decided yet, as) they were not in doubt that appraisement was necessary of the time needed for the injured person to be cured, etc., but they still doubted if the article which caused the damage must be investigated whether it was capable of causing such damage or not. Come and hear the decision of Simeon the Timani stated above, from which is to be inferred that investigation is necessary also for damages. And so it is.

The Master said: If he was examined, and it was concluded that the healing must take a certain time, and he was healed before the time, he gets nevertheless the full amount. This will be a support to Rabha, who said that he who is examined, and it is concluded that his sickness will continue the whole day, and he becomes cured in half a day, so that the other half day he is doing some work, he is nevertheless paid for the full day, as it

is considered that his sickness was shortened by the mercy of Heaven.

"*If he spat in such a manner,*" etc. Said R. Papa: On those parts of his body which were not covered, but not if the spittle fell on his garments. But let it be considered as if he caused him shame by words? In the West it was said in the name of R. Jose b. Abin that from the above explanation of the Mishna by R. Papa is to be inferred that if one disgraces another by mere words he is free.

"*Rank and station,*" etc. The schoolmen propounded a question: The statement of the first Tana, shall it be construed leniently or rigorously? Leniently, if he was a poor person he must not be paid so much as if he were a rich one, or rigorously, that if he was of higher station he is paid more for the disgrace caused him? Come and hear R. Aqiba's statement in the same Mishna, that even the poorest man must be considered as an independent man, etc., from which it is seen that the first Tana meant leniently. And so it is.

"*It happened that one bared,*" etc. Do we, then, allow time for payment in such a case? Did not R. Hanina say that in cases of wounding no time is given? Yea. We do not allow time in cases of pecuniary damage, but in cases of disgrace, where there is no pecuniary damage, time is allowed.

"*He watched her when she was standing,*" etc. But the Boraitha states that R. Aqiba said to him: You dived into deep waters and brought up a fragment of a clay vessel: one may wound himself, but if others wound him they must pay (and in our Mishna it states that a man must not do so)? Said Rabha: This presents no difficulty. The Boraitha speaks of a wound which is not allowed, while the Mishna speaks of disgrace, which one is allowed to cause to himself.

But the Mishna speaks of disgrace only, and still R. Aqiba said, "Although he is not allowed," etc.? R. Aqiba meant to say thus: It is not only in case of disgrace, which one may do to himself, and still if caused by another he is responsible; but even in case of wounding, in which he is not allowed to do it to himself, and after he himself did it others came and caused him other wounds, they are nevertheless responsible.

"*One who cut off his plants,*" etc. Rabba bar bar Hana taught in the presence of Rabh: "If the plaintiff says, 'You killed my ox,' or, 'You cut off my plants,' and the defendant answer, 'You ordered me to do so,' he is free." Said Rabh to

him: If so, you would not leave life to the people—must he then be believed that he was ordered to do so? Rabba bar bar Hana answered: Then ignore it. Said Rabh to him: Why should you not explain your Boraitha that it treats of an ox which was sentenced to be killed, or of a tree which the court ordered to be cut off? He rejoined: If so, then what is the complaint of the plaintiff? The complaint is thus: I wanted to do this commandment myself, as we have learned in the following Boraitha: It is written [Lev. xvii. 13]: "Then shall he pour out the flood thereof, and cover it up," etc. This means that the covering up must be done by the one who pours it out (if he desires to do so); and it happened of one who slaughtered a fowl and another anticipated him and covered its blood with dust, that R. Gamaliel made him pay ten golden zuz. (Hence one has the right to complain for a meritorious deed which he was prevented from doing.)

Rabh said: A tree that contains a kabh of fruit is prohibited to be cut off. Said Rabhina: If, however, the tree be worth more in wood, it may be done. We have learned so also in the following Boraitha. It is written [Deut. xx. 20]: "Only those trees of which thou knowest"—that means, a tree which bears fruit; "that they are not fruit-trees"*—that means, a wild tree. Now as, according to this explanation, every tree which is needed may be cut off, why, then, the words "that they are not fruit-trees"? To teach that if there are both wild trees and fruit-trees, the wild trees have the preference to be cut off. But lest one say that even when the fruit-tree is worth more in being used for a beam in a building than for its fruit, the wild tree must be cut off first, therefore it is written "only."

The gardener of Samuel brought him dates in which Samuel tasted a taste of wine, and to the question why it was so the gardener answered that the dates were growing in the vineyard, and Samuel said: If they absorb so much sap of the vines, uproot them and bring me their roots to-morrow.

R. Hisda, when he noticed young date-trees in his vineyard, told the gardener to uproot them, saying: Vines are valuable and date-trees may be bought from their income, while date-

* The Talmud divides this verse into two parts, which in reality reads well as it is, and Rashi tried to explain it that because there are a few superfluous words it ought to read "only a tree that bears no fruit," why, then, the words, "which thou knowest"? And this is the reason why the Talmud infers from this that even a fruit-tree may be cut off when needed.

trees are only of slight value, and from their income vines cannot be bought.

MISHNA *V.*: All that which is said regarding payment for disgrace is only for the satisfaction of the pecuniary damage, but the hurt feelings of the disgraced are not forgiven, unless he prays and secures forgiveness from the plaintiff, as it is written [Gen. xx. 7]: "And now restore the man's wife," etc. And whence is it deduced that if the defendant does not forgive he is considered cruel? From [ibid., ibid. 17]: "And Abraham prayed unto God, and God healed Abimelech," etc. If one says to another: "Blind my eye, cut off my hand, break my foot," he (the defendant) is liable, even if he told him so on the condition that he should be free. If he told him: "Tear my garment, break my pitcher," he is liable. If, however, he told him so on the condition that he should be free, he is so. If one says to another to do such damage to a third person, even on condition that he should be free, the defendant is liable whether it be personal injuries or injuries to property.

GEMARA: The rabbis taught: All that which was said concerning disgrace is only for the civil court, as to how much the plaintiff should receive, but there can be no satisfaction for the injury to the feelings, for which, if he would even offer all the best rams of the world, they would not atone for it, unless he prays the plaintiff for forgiveness, as the verse quoted in the Mishna reads farther on: "For he is a prophet, and he will pray for thee." For he is a prophet! Must, then, only a prophet's wife be restored, and not that of an ordinary person? Said R. Simeon b. Na'hmani in the name of R. Jonathan: Read thus: Restore the man's wife; (and) because he is a prophet, he will pray for thee—which means that another's wife must be restored. And your claim [ibid., ibid. 4 and 5]: "Lord, wilt thou then slay also a righteous nation? Said he not unto me, She is my sister?" etc., is of no avail; for if a stranger comes to a city, he is usually questioned only what he would eat or drink, but not who is his wife or relatives, as your habit is; and because he was a prophet and he knew what you were going to ask him, therefore he and Sarah were compelled to say so. Infer from this that one is punished even when he commits a crime through ignorance, because he ought to learn and know.

It is written [ibid., ibid. 18]: "Every womb." Said the disciple of R. Janai, even the hen of Abimelech's household did

not lay its eggs. Said Rabha to Rabba bar Mari: * Whence is the following saying of the rabbis deduced: He who prays in behalf of his neighbor for a certain thing which he himself needs, he is answered first? He answered: From the following verse [Job, xlii. 10]: "And the Lord brought back the captivity of Job, when he prayed in behalf of his friends." He said to him: You deduce it from this, and I deduce it from the following verse [Gen. xx. 17]: "And Abraham prayed unto God, and God healed Abimelech, and his wife, and his maid-servants," etc.; and immediately thereafter it is written [ibid. xxi. 1]: "And the Lord visited Sarah as he had said," etc., which means, as Abraham prayed in behalf of Abimelech.

Said Rabha to Rabba bar Mari: Whence do we deduce the following people's saying: With the thorn the rose is also beaten? He answered: From the following verse [Jer. ii. 29]: "Wherefore will ye contend with me? *all* of you have transgressed against me, saith the Lord." ("All," although there were some who were righteous, as the prophets, etc.) Said he to him: You deduce it from this verse, and I deduce it from the following [Ex. xvi. 28]: "How long refuse *ye* to keep my commandments," etc. ("ye" includes Moses and Aaron also).

The same said again to the same: It is written [Gen. xlvii. 2]: "And he took some of his brothers, five men." Who were the five? He answered: So said R. Johanan: Those whose names were mentioned twice in the benediction of Moses [Deut. xliii.] (Zebulun, Gad, Dan, Asher, and Naphtali). But is not Jehudah's name also mentioned twice? Jehudah's name was mentioned twice for another purpose (explained in Tract Makkoth, 10). He questioned him again: What is the origin of the following people's saying: "One misfortune follows the other"? He answered: In the following Mishna: "The rich bring the first-fruit in golden or silver baskets (and take the baskets back), while the poor bring it in willow baskets, and the baskets remain with the fruit for the priests." He said to him: You find it in the Mishna, and I find it in the Scripture [Lev. xiii. 45]: "And

* The following series of questions is placed here because of the verse quoted, "and Abraham prayed unto God," etc., from which Rabba bar Mari delivered his statements in the text differing from Rabha; and at the same time he mentions here all other statements which each of them deduces from different verses, and casually also others. They wanted also to find the origin of even the ordinary adages of the people in the Holy Writ, on account of what is stated elsewhere in the Talmud, that there is nothing in the world for which there can be found no hint in the Scripture. (See vol. viii., Tract Taanith, p. 9.

the leper. . . . Unclean, unclean, shall he call out." (Hence, it is not enough that he is afflicted, he must himself call it out.)

He said again: Where is the origin for the rabbis' saying: Arise early in the morning and eat something, in the summer because of the heat and in the winter because of the cold; and people say: Sixty men were running after one who used to eat early in the morning, and could not overtake him? In the verse [Is. xlix. 10]: "They shall not be hungry nor thirsty, and neither heat nor sun shall smite them." Said he: I, however, find the origin in the following [Ex. xxiii. 25]: "And ye shall serve the Lord," which means the reading of Shema and prayer; "And he will bless thy bread, and thy water," which means the bread and salt and the pitcher of water one takes immediately thereafter; [and then he may be sure that] "I will remove sickness from the midst of thee."

He said again: What is the origin of the rabbis' saying: If your neighbor calls you "ass," put on a saddle (*i.e.*, do not answer him)? He answered: In [Gen. xvi. 8]: "And he said, Hagar, Sarah's *maid*. . . . And she said, From the face of my *mistress*."

He said again: And wherefrom is the people's saying: "When talking to a stranger, tell him first of all the position you are in"? He answered: From [ibid. xxiv. 34]: "And he said, I am Abraham's *servant*." And wherefrom is the people's saying: A duck while it keeps its head down, its eyes still look at a distance? He answered: From [I Samuel, xxv. 31]: "And when the Lord will do good unto my lord, then do thou remember thy handmaid." (While praying to save her life, she hinted that he should marry her.)

And wherefrom the following people's saying: For the wine furnished by the host to his guests thanks are due; the main thanks, however, receives the man who takes care of serving the same in a nice manner? He answered: From [Numb. xxvii. 19]: "And thou shalt lay thy hand upon him"; and also [Deut. xxxiv. 9]: "And Joshua the son of Nun was full of the spirit of wisdom; for Moses had laid his hands upon him, etc." (Hence we see that the whole credit is given to Moses.) And wherefrom the following people's saying: A tree bearing bad fruit usually keeps company with trees which do not bear fruit at all? He answered: This is written in the Pentateuch, repeated in the Prophets, mentioned a third time in the Hagiographa, also learned in a Mishna

and taught in a Boraitha: *Pentateuch* [Gen. xxviii. 9]: "And Esau went unto Ishmael." *Prophets* [Judges, xi. 3]: "And then gathered themselves to Yiphthach idle men, and they went out with him." *Hagiographa* [Ben Sira, xiii.]: "Every fowl associates with its kind and man with his equal." *Mishna:* "All that is attached to an unclean article is unclean and all that is attached to a clean article is clean." *Boraitha:* "R. Eliezer said: Not in vain did the cuckoo go to the crow, because it is of its kind." He said again: And wherefrom the following saying: If you advise your neighbor and he does not heed your advice, press him to the wall and let him suffer? He answered: From [Ezek. xxiv. 13]: "Because I endeavored to cleanse thee, and thou wouldst not be clean, thou shalt not be cleansed from thy uncleanness any more." And wherefrom the following saying: Do not spit in the well from which you drank water? He answered: From [Deut. xxiii. 8]: "Thou shalt not abhor an Edomite; for he is thy brother; thou shalt not abhor an Egyptian; because thou wast a stranger in his land." And wherefrom the following saying: If you will help me to lift the burden, I will carry it; and if not, I will not touch it? He answered: From [Judges, iv. 8]: "If thou wilt go with me, then will I go; but if thou wilt not go with me, I will not go." And wherefrom the following: When we were young we were considered as men, and now when we are old we are considered as children? He answered: It is first written [Ex. xiii. 21]: "And the *Lord* went before them . . . and by night in a pillar of fire, to give light to them"; and thereafter [ibid., xxiii. 20]: "Behold I send an *angel* before thee, to keep you on the way." And wherefrom the following: If you keep in touch with oil, your hands will become oily? He answered: From [Gen. xiii. 5]: "And Lot also, who went with Abram, had flocks, and herds, and tents." R. Hanan said: Whoso calls down divine judgment on his neighbor is punished first, etc. (See Rosh Hashana, p. 22. There, however, it is said in the name of R. Abin.) R. Itz'hux added to this: Woe to him who cries for such, more than to him upon whom the judgment is called down. We have so also learned in the following Boraitha: "Both are punished (by the Divine Court), but the one who calls down the judgment is punished first." The same said again: Do not hold light the curse of a common man, etc. (See Vol. VIII., Tract Megila, p. 38.) R. Abahu said: It is better for one to be of the persecuted than of the persecutors, as there are no more persecuted birds than doves and

pigeons, and the Scripture made them fit for the altar. "Blind my eye," etc. Said R. Assi * to Rabba: Why in the first part the condition that he should be free is of no effect, and in the second part it is? He answered: Because no one will ever forgive for the loss of the principal members of his body. Said he to him: Does, then, a man easily forgive for pain—and nevertheless a Boraitha states: "If one say to another, 'strike me,' or 'wound me, upon condition that you should not be liable for it,' and if he does so, he is free? Rabba remained silent. Thereafter he said to him: Do you know how to explain this? He said: So said R. Shesheth: The reason is for the indignity caused to his family. It was taught: R. Oshiya said: For the reason just mentioned; and Rabha said: Because one does not forgive for the loss of the principal members of his body. R. Johanan, however, said: One may forgive for all that was done to him; and our Mishna, which makes him liable, although it was on the condition that he should be free, is because there is sometimes a "nay" which means "yea" and a "yea" which means "nay" (explained in the following Boraitha). We have learned also in the following Boraitha: If one says to another, "Strike me," or "wound me," and the other asks, "On condition that I should be free?" and he answered "Yea!" (*i.e.*, if so, you would like to do so)? Hence this "yea" means "nay." "Tear my garment," and he says, "And thereafter I should pay for it?" And he answers, "Nay." which means "Yea, you may do so."†

"*Break my pitcher*," etc. There is a contradiction from the following Boraitha: It is written [Ex. xxii. 6]: "If a man . . . to keep," etc., for preservation; but not when he says to him keep it for destruction or for charity. (Hence we see that if he told him to keep it for destruction, although he did not say on the condition of being free, he is nevertheless free?) Said R. Huna: This presents no difficulty: The Boraitha speaks of when it was delivered to the bailee for, and he accepted it for,

* This name is correct, according to Alphasi, as the name mentioned in the text would be incompatible with the time in which R. Assi b. Hama lived.

† R. Johanan explains that our Mishna speaks of when there was a question and an answer between the plaintiff and the defendant, and it was not clear whether it meant yea or nay; the Boraitha, however, speaks of when the plaintiff made the condition that the defendant should be free without any question by the other. This is Rashi's explanation. The text, however, of R. Johanan's saying mentioned above seems to us to be very simple: It must be investigated how the condition is to be understood—whether it is in the absolute affirmative form or in the form of a question.

destruction—then certainly he is free ; and the Mishna speaks of when he told him to break the pitcher when the same was yet in the hands of the owner. Said Rabba to him: The words "to keep" in the Scripture mean certainly that it was delivered to the bailee; and nevertheless, if thereafter he told him to destroy it, without making the condition to be free, he is liable, unless he told him to keep it for destruction at the time of the delivery? Therefore said Rabba: Both cases treat of destruction after the delivery; but the Mishna speaks of when he told him to destroy it after he received it for safe-keeping, and the Boraitha speaks of when he told him at the time of the delivery to keep it for destruction.

There was an *ἀρνἄχίς* of charity which was sent to Pumbeditha, and R. Joseph deposited it with a certain man who did not take good care of it, and it was stolen from him. R. Joseph held him responsible. Said Abayi to him: Did not the Boraitha state, to keep it for preservation, but not for charity? He answered: The poor of Pumbeditha receive each a fixed sum from charity, so that this money belonged to them, and they can be the claimants thereof (and the reason why the Boraitha holds the bailee free, if it was given to him to keep it for charity, is because where the poor do not receive fixed sums at certain periods they cannot claim a certain fixed amount, and therefore it is considered that there are no claimants).

END OF VOLUME II. (X.)

[Note.—The last two chapters of The First Gate will be printed in the succeeding volume.]